Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

VERSIE KIMBLE

Plaintiff-Appellant,

VERSUS

D. J. McDUFFY INC., *et al*

Defendant-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

1. Versie Kimble
2. Industrial Foundation of the South
3. D. J. McDuffy, Inc.

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No.

In The

Supreme Court of the United States

October Term, 1981

Versie Kimble,

petitioner

v.

D. J. McDuffy Inc., *et al*

respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Versie Kimble respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 18, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals is at 648 F.2d 340 (5th Cir. rehearing en banc, June 18, 1981). The opinion of the three judge panel for the Court of Appeals for the Fifth Circuit is at 623 F.2d 1060 (5th Cir. 1980). The District Court opinion is at 445 F. Supp. 269 (E.D.La. 1978). The District Court opinion, the three judge appellate opinion and the en banc appellate rehearing opinion are at pages App. 11, B-1, C-1 and D-1 of the appendix, respectively.

JURISDICTION

The judgement of the Court of Appeals for the Fifth Circuit rehearing en banc, was entered on June 18, 1981. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is envoked under 28 U.S.C. § 1254(1).

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QUESTIONS PRESENTED

1. Whether 42 U.S.C.A. 1985(2) is enforceable per se, or is a showing of racial or class-based anmus, or independent illegality, required in order to state a cause of action under the statute.

2. Whether the word "attended" in the statute should be given a broad interpretation to protect a citizen throughout the Federal litigation process, or a constricted interpretation so as to protect only citizens actually within the confines of the Federal court building; a "res nova" issue.

3. Whether this special group of workingmen and women; seamen, offshore workers and others, who have traditionally enjoyed Congressional, state, statutory, and judicial protection, is an invidiously discriminatory animus.

STATEMENT OF THE CASE

Versie Kimble-Petitioner, a 32 year old offshore oil field worker, filed a class action complaint against the Industrial Foundation of the South and its subscriber-members on May 13, 1973, on behalf of himself, "and all others similarly situated . . . who had been deprived of the right to work by the various subscriber-members of the Industrial Foundation of the South" (the Foundation), as a result of filing a suit in Federal court for damages arising out of on-the-job accidents.

Petitioner's suit was brought under 42 U.S.C. 1985(2). Petitioner contends that the Foundation and its members conspired to deter Petitioner and his fellow class members, through intimidation, from freely and fully testifying in their cases filed in Federal court, and to damage them in their person or property on account of having so attended or testified.

The Foundation, a Louisiana non-profit corporation, owned and operated by over 300 "oil patch" companies, checks Federal and state records in Louisiana, Texas, Mississippi, Alabama, Oklahoma, New Mexico and Missouri for the purpose of discovering and indexing all worker suits filed against companies in the oil industry. Some of the record examiners are salaried employees of the Foundation. However, the majority are district clerks and assistants to district clerks, who are paid a sum of money for each case they report to the Foundation.[1]

The Foundation, from the information furnished to it by its examiners, prepares an index card on each workman who files a suit. The index card contains the name of the

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[1] *Kimble* v. *D. J. McDuffy, Inc. and Industrial Foundation of the South*, 623 F.2d 1060 at page 1062, Note 2 (5th Cir. 1980), Appendix page C-2.

plaintiff, the name of plaintiff's attorney, the plaintiff's social security number, the docket number of the case, the title of the case, the general type of injury (hand, arm, back, head, etc), and the result of the suit, if any. No information is contained on the index card that would assist one in determining the employability of an applicant from a physical, mental or integrity standpoint.

When someone applies for employment with a Foundation member-employer, the applicant's name and Social Security number are called in to the Foundation. The Foundation runs the name and Social Security number through its index and advises the inquiring member if the job applicant has ever filed a suit. An affirmative reply results in rejection and a negative reply results in employment.

The Foundation was incorporated on May 31, 1966. The organizers and incorporators were composed of executives in the employ of oil companies or companies affiliated with the oil industry, primarily engaged in offshore activities. One of the purposes of the corporation, as set forth in Article II of the Articles of Incorporation, is, "to foster, protect, and promote the welfare and interest of all of those engaged in the production, refining, and marketing of petroleum and any and all other affiliated industries in the South, and to protect and encourage such trade and commerce by serving as a central agency to combine the intelligence and influence of members against imposition and fraud." To further the foregoing aims, the index card, which is their sole function, is prepared for every party plaintiff that has filed a personal injury lawsuit in any of the Federal courts in the states they service.

Industrial Foundation of the South, according to a letter of April 18, 1974, attached to the deposition of H. J. Robinson, its General Manager, in the record, "is a medium through which industry can unite and be offensive, thus

simplifying the ever growing task of defense against outside encroachment."

Versie Kimble-Petitioner injured his shoulder in 1969 while working for Noble Drilling Company. He filed suit in Federal court where a jury returned a $35,000 judgment in his favor. The Foundation then, mistakenly, set up an index card for Petitioner under Social Security number 429-74-3356. Petitioner's correct number is 427-74-3356. Thus, when Petitioner applied for work, after recovering from his injuries suffered in 1969, he was hired by Reading & Bates, a subscribing member of the Foundation.

While working for Reading & Bates, Petitioner sustained a broken finger and filed a suit against them in the United States District Court for the Eastern District of Louisiana, which was settled for $6,500.00. This suit was picked up by the Foundation and an index suit card established on Petitioner under his correct Social Security number.

Petitioner was out of work for a period of eight months following his recovery from the injury to his finger. He attempted to obtain employment in the offshore oil industry and on each occasion was rejected by employer-members of the Foundation after he submitted his name and correct Social Security number. The employers with whom he applied were all hiring and had no other reason to deny employment to him. The drillers in some instances hired him and then advised him that they were ordered to terminate him because of the suit that appeared in the index card with the Foundation.

Petitioner applied for employment and was hired by D. J. McDuffy, Inc. in December of 1972. McDuffy, at that time, was not a member of the Foundation but joined in March, 1973 and fired Petitioner for allegedly "engaging in politics." Subsequently, Petitioner applied for employ-

ment with a number of employer-members who were hiring, and on each occasion was rejected without reason.

In 1974, Petitioner applied with Ward Drilling Company, an employer-member of the Foundation, using his wife's Social Security number and obtained a job. Since 1974, Petitioner has worked for employer-members under his wife's number.

Arthur Jean Case, whose deposition is in the record, was also successful in landing a job using his wife's Social Security number, following an injury that had been indexed by the Foundation.

Benjamin C. Tisdale, III and Howard Hampton, whose depositions are in the record, were employees of Flour Ocean Services, Inc., a member-employer, and testified that they were responsible for the hiring and firing of all employees for their employer. They further testified that Mr. Tesson, the senior executive officer of their employer, and a Director of the Foundation, instructed them not to hire any prospective employee that the Foundation reported to have filed a suit. Mr. Tisdale further stated that if an employee were hired on a week-end or on a holiday, such worker would be sent to work and a Foundation check made on him at a later date. If the Foundation reported that the employee had filed a suit, the employee would be brought in and fired. The records from Flour Ocean Services, Inc. would not reflect the reason for the firing; a false reason would be given such as reduction of the work force. Mr. Tisdale and Mr. Hampton testified that anybody that filed a suit was considered a "bad actor" and unemployable. These facts are further verified by Lloyd Martin whose deposition is in the record.

Mr. H. J. Robinson, in his deposition, taken on August 26, 1974, at page 97, in the record, states that there are 10,000 to 20,000 suits per year recorded by his company

against working men. He testified, further, that his company receives approximately 92,000 requests for reports per year on workingmen and women and that his company maintains over one-half million records on workingmen.

On March 24, 1975, Judge Fred J. Cassibry, of the United States District Court for the Eastern District of Louisiana, certified the class and instructed plaintiff-appellant to submit a plan for identification and notification of the class.[2] A proposed plan was timely submitted to His Honor below. However, Judge Cassibry felt that the class was unmanageable and de-certified the class insofar as the damage issue was concerned. The class thereafter survived as a class action for injunctive relief against the Foundation and its member companies. Defendants made a number of unsuccessful efforts to have the class action dismissed before Judge Cassibry on substantive and jurisdictional motions. Judge Cassibry withdrew from the case due to a possible conflict and the case was thereafter alloted to Judge Alvin Rubin.

The defendants filed a motion for summary judgment before Judge Rubin, who then, with written reasons for doing so, granted the summary judgment dismissing Plaintiff-Appellant's suit.[3]

Plaintiff-appellant filed a timely appeal to the United States Fifth Circuit Court of Appeals. The three judge panel of the Court of Appeals, the Honorable Sam D. Johnson as the organ of the Court, on the 14th day of August, 1980, reversed the District Court decision and held that: (1) if the companies refused to hire individuals

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[2] *Kimble, et al.* v. *D. J. McDuffy, Inc. and Industrial Foundation of the South and all Subscriber-Members*, Civil Action 73-1416, Section "E".

[3] *Kimble, et al* v. *McDuffy and the Foundation of the South, et al*, 445 F.Supp. 269 (E.D.La 1978), Appendix page B-1.

because they asserted personal injury claims in Federal court, the individuals would be entitled to relief under the Federal Conspiracy to Obstruct Justice Act provision barring conspiracies to injure a party or witness in his person or property on account of his having attended or testified in any court of the United States, however (2) the individuals would not be entitled to relief under any other provision of the act.

> "The district court's grant of summary judgment against plaintiffs who allege they were discriminated against because they filed a personal injury claim in Federal court is reversed. These plaintiffs have a cause of action under Section 1985(2), clause B that survives summary judgment. The district court's grant of summary judgment against plaintiff Versie Kimble on his claim for damages is also reversed. Kimble also has a cause of action for damages under clause B that survives summary judgment."

The defendants applied for and were granted a rehearing en banc. The United States Court of Appeals, Fifth Circuit, Ainsworth, Circuit Judge, on the 18th day of June, 1981, with 7 dissenting and 4 concurring opinions supporting some of the issues presented herein, reversed the decision of the three judge panel and held that: (1) 42 U.S.C. 1985(2), as based on the Ku Klux Klan Act of 1871, requires a showing of a racial or class-based discriminatory animus; (2) in enacting such provision Congress meant to protect a party based on his physical presence while attending or testifying in court; and (3) section 1985(2) was not designed as a vehicle to remedy allegedly tortious acts of employers against employees pursuing workmen's compensation or personal injury claims and absent some allegation of direct interference with employee's testifying or attending in Federal court, no cause of action was stated thereunder.

Petitioner's original suit was within the District Court's jurisdiction pursuant to 28 U.S.C. 1331; "arising under" federal law. Petitioner timely files writs of certiorari and review to this Court.

REASONS FOR GRANTING THE WRIT

1. The decision herein, as it relates to an interpretation of 42 U.S.C. 1985(2), conflicts with decisions of the Eighth, Third, Seventh and D.C. Circuits of the United States Courts of Appeals.

The pertinent portion of section 1985(2) of Title 42 of the United States Code provides that:

> "If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment, lawfully assented to by him, or of his having been such juror; . . ." (underscoring added).

It is significant that the foregoing portion of 42 U.S.C. 1985(2) specifically applicable to "any court of the United States" *does not* contain an "equal protection of the law" provision.

The second portion of 1985(2) behind the semicolon, specifically applicable to "justice in any State or Territory" *does* include the "equal protection of the law" provision. It provides:

> ". . . or if two or more persons conspire for the purpose of impeding. hindering, obstructing or defeating, in any manner, the due course of justice in any

> State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing or attempting to enforce, the right of any person, or class of persons to equal protection of the law;" (underscoring added).

Did the United States Congress inadvertently leave out the critical phrase "equal protection of the law", directly related to the 14th Amendment, when addressing the protection of the *Federal Court process* and carelessly throw in such a significant phrase when addressing the protection of the *course of justice in any State or Territory,* or did the Congress with diligent intent make the reasoned distinction? To hold the former would do a great disservice to the Congress in an instance wherein they were obviously attempting to reserve to the Federal courts the greatest possible authority to protect their system in order to avoid an intrusion on Article III of the United States Constitution. Obviously, the Congress, in addressing the "Course of Justice in any State or Territory", would have liked to grant greater authority but was constitutionally restrained by the Tenth Amendment and its "reserved to the States respectively" language. The Fourteenth Amendment specifically disallows any *State's* depriving any person the equal protection of the law. 42 U. S. C. 1985(2), in the second section, after the semicolon, addresses itself to denial of "equal protection" in any State or Territory; thus is applicable to the States through the Fourteenth Amendment. The first section of (2) seeks to protect courts of the United States; a far different proposition, and one provided for by the "necessary and proper" cause of Art. I, Section 8. The "foregoing powers" mentioned include, of course, Art. III which establishes the judicial power. Section 1985(2), the first section, is a Congressional guarantee of the Art. III powers.

The Fifth Circuit decision on rehearing en banc herein, per Circuit Judge Ainsworth, holds that the *Griffin*[4] requirement for section 1985(3), literally specified by the inclusion therein of the traditional "equal protection of the law" phrase, applies as well to all of section 1985(2). The majority found none present in the instant case. However, Judge Rubin, the District Judge, seven dissenting Appellate Justices and four concurring Appellate Justices concluded that the *Griffin* requirement did not apply to the first portion of section 1985(2) which is applicable to the Federal courts.

The Third Circuit, in *Brawer* v. *Horowitz*,[5] expressly held that only the second part of section 1985(2), and not the first part, requires a racial or class-based discriminatory animus.

The *Brawer* court specifically eliminates the "equal protection" requisite from the first half of section 1985(2):

> "The first half of section 1985(2) aimed at conspiracies the object of which is intimidation of or retaliation against parties or witnesses, or grand or petit jurors, in any court of the United States. The federal nexus, then is not the class-based, invidiously discriminatory animus required by the second half of the subsection, but the connection of the proscribed activities to a federal court."

The Seventh Circuit in *Stern* v. *U.S. Gypsum, Inc.*,[6] in dicta, affirmed the *Brawer* decision, when it stated at Note 18:

> "Arguably, at least, the first portion of section 1985(2) aims at protecting the sanctity of federal court proceedings and could be sustained without any references to the Reconstruction Amendments."

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[4] *Griffin* v. *Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

[5] *Brawer* v. *Horowitz*, 535 F.2d 830 (3rd. Cir. 1976).

[6] *Stern* v. *U.S. Gypsum, Inc.*, 547 F.2d. 1329 (7th Cir. 1977).

The Court went on to state that the *Griffin* analysis and requirements do not hold for all of section 1985. As Chief Justice Marshall said, "It is a maxim, not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used."[7] We suggest that the cases involving section 1985(3) from which the statements on "invidiously discriminatory class-based animus" are taken, be taken in their context: that of a section 1985(3) case. To extract such language and apply it as a whole to a section not requiring and not announcing, such is to misapply same. Congressional intent, as manifested by their debates quoted in almost all of the 42 U.S.C. 1985 cases, was to protect citizens' civil rights. They debated each and every phrase and at length, decided NOT to put in the "equal protection" language in the first part of section 1985(2). There was no need. It was directed at protection of the sanctity of the Federal court system which is to be protected for all citizens as a fundamental right.

In *Kelly* v. *Foreman*,[8] the District Court said:

> ". . . the court believes the statute [1985(2)] is more understandable if divided into two parts, one before and one after the semi-colon. After the semicolon the statute repeats the language with which it begins: 'if two or more persons conspire . .' Before the semicolon there is no 'equal protection of the laws' language. Rather, the statute speaks in terms of conspiratorial activities taken in connection with cases pending in 'any court of the United States.' After the semicolon the statute, like section 1985(3), speaks in terms of the equal protection of the laws. It is logical to assume that Congress intended by the language of section 1985(2) before the semicolon to protect specific

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[7] *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399, 5 L.Ed. 257 (1821).

[8] *Kelly* v. *Foreman*, 384 F.Supp. 1352 (S.D.D.C. Texas 1974).

> activities vital to the functioning of courts of the United States, without requiring any allegations or proof of invidious discrimination."

The D.C. Circuit, in *McCord* v. *Bailey*,[9] held that the *Griffin* invidiously discriminatory animus requirement was inapplicable to the first part of section 1985(2) when trying to avoid the Constitutional shoals of creating a general Federal tort law because there would be no problem of limitations on Congress' power with regard to protection of the federal interest in its judicial process.

In *Britt* v. *Suckle*,[10] the court states that the class-based animus requirement of *Griffin* is a product of statutory interpretation.

> "Where, a fundamental right is implicated, such as the right of free speech, all distinctions among classes, whether or not traditionally discriminated against, require close scrutiny."

In addition to these varying Circuit and District court interpretations, there is serious conflict within the Fifth Circuit itself as to this Statute. In construing this section of the act, the Fifth Circuit, in its rehearing en banc, held that there was no cause of action under section 1985(2). Of the 23 justices sitting en banc, a total of eleven held no racial or class based animus was required. If you include Judge Rubin, who has now been elevated to the Fifth Circuit Court of Appeals, more judges of that court have held that a class-based animus is not required. Four of these concurred with the main opinion, but agreed with the

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[9] *McCord* v. *Bailey*, 636 F.2d. 606 (D.C. Cir. 1980), cert. filed, 49 U.S.L.W. 3532 (Jan. 13, 1981).

[10] *Britt* v. *Suckle*, 453 F.Supp. 987 (E.D. Texas 1978).

dissenters that this animus was not required. Seven justices strongly dissented with explanations of each point with which they disagreed with the principal opinion.[11] The dissents note that *Griffin* was a section 1985(3) case, not (2) as is the instant case, thus suggesting that the Fifth Circuit, en banc, misconstrued section 1985(2), in applying the jurisprudential requirements of (3) to the present case. The dissents rightly note that the Eighth Circuit affirmed no cause of action in *Jones* v. *United States*[12] while citing *Griffin's* requirements but addressed the present question with only three brief sentences. *Jones* is frequently cited as affirming *Griffin* for section 1985(2) cases but does so without discussion or explanation.

Judge Ainsworth's opinion in the present case recites the *Griffin* requirements as prevailing in addition to his interpretation of the statutory language.

Judge Ainsworth, in his opinion in the record, would require: (1) racial or class-based animus, (2) physical presence in the courtroom, (3) direct interference. Yet, he himself, in Note 8 of his opinion, notes that 1985(2) is:

> "act designed to prevent retaliation against those who seek to enforce their rights under the Civil War Amendments: An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for other purposes." (underscoring supplied)

The very title of the Act including "and for other Purposes" indicates that Congress knew what it was doing in not requiring the "equal protection" language in the por-

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[11] *Kimble et al* v. *D. J. McDuffy, Inc. et,* 648 F.2d. 830 (5th Cir. rehearing en banc 1981).

[12] *Jones* v. *United States,* 401 F.Supp. 168 (E.D.Ark. 1975), aff'd, 536 F.2d 269 (8th Cir. 1976), cert. denied, 429 U.S. 1039, 97 S. Ct. 736, 50 L.ED. 2d 750 (1977).

tion of the statute in question. The very act of filing suit in Federal court is a right of a citizen. Job discrimination as a result thereof would be within the intendment of the statute.

These differing constructions of requirements for the statute in question, 42 U.S.C. 1985(2), cry out for clarification by a higher authority to insure that the Congressional and Constitutional intent of preserving citizens' access to the court system is maintained and enforced. Citizens, often times, have no recourse but to the mercy of the courts. Without access to the judicial system, these working men will be denied a fundamental civil right.

2. The decision below raises, *res nova*, the interpretation of the critical word "attended" as used in 42 U.S.C. 1985(2).

In the en banc Fifth Circuit decision, in the Appendix at page C-2, the opinion hinged upon the interpretation of the word "attended", and the *Griffin* class-based animus requirement, to sustain a cause of action under 42 U.S.C. 1985(2). The three judge panel decision by Judge Johnson, in the Fifth Circuit, rejected the narrow reading of the statute in which the District Court had held that the phrase "attended or testified" required actual physical presence in a court room.

> "the process of obtaining justice in the court system begins long before a case is called to trial — it is initiated at the moment a party files a complaint."

The rehearing decision reinstates the narrowest possible reading of the statute and in so doing, has wiped out the only possible remedy for injustice for approximately 500,000 workingmen and women.[13]

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[13] Deposition of H. J. Robinson, general manager of the Foundation; in the Record.

In *C-Line, Inc.* v. *United States*,[14] partially based upon statutory interpretation, the court stated that an exception to the general principle of statutory definitions controlling the meaning of the words, arises when a mechanical application of the statutory definition creates obvious incongruities in the language of and destroys a major purpose of the statute. In that case, the statutes in question had a definitions section; which the court overrode. In the present case, with no definitions section, surely, the context of the use of the word is more relevant than the precise dictionary meaning as read by Fifth Circuit en banc.

In *United States of America* v. *Bradford*,[15] the defendant argued that a conviction based on 18 U.S.C. 1702 was invalid as section 1702 applies only to personal correspondence. The court quoted the dictionary definition but rejected such a narrow interpretation as not being within the intent of the statute. The term "correspondence" was extended to include non-personal messages directed to addressee; as opposed to precise dictionary definition of "communications between persons."

Petitioner suggests that when the working lives, property, income and support of families are at stake, the most narrow interpretation possible of a single word in a statute is inappropriate; especially when the statute is intended to protect the citizenry's civil rights.

The Constitution, Article 3, Section 2, clearly gives Congress the power to establish and ordain courts. Congress, through 42 U.S.C. 1985(2), is simply guaranteeing the citizens' rights of access to the Constitutionally mandated court system. This right, we suggest, should not depend upon a court's narrow view of a single word, but

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[14] *C-Line, Inc.* v. *United States*, 376 F. Supp. 1043 (D.C. RI 1974).

[15] *United States of America* v. *Bradford*, 493 F.2d 1282 (7th Cir. 1974).

upon whether or not the court intends to protect itself from encroachment and, if so, how far? To say that petitioners have not "attended" in some manner is inconceivable. In effect, the rehearing court has said that a man assaulted inside the door of a courthouse is protected, but if assailed outside on the sidewalk, it is just tough luck. Justice is hardly preserved by a revolving door system.

3. If the Supreme Court accepts the requisites of the Fifth Circuit, we suggest that these 500,000 working men and women *DO* meet the requirements.

Petitioner clearly falls within the Article 3, Section 2, Clause 1 jurisdiction: "the laws of the United States", as his suit on behalf of himself and approximately 500,000 working men and women is brought under 42 U.S.C. 1985(2). We suggest that Congress, in its enactment of a statute designed to prevent a conspiracy to obstruct justice could have made it applicable to Ku Klux Klan members only or to any other class of persons that they desired to name. They did not do so. The statute speaks of "any party or witness" and "his person or property", NOT any racially or class-based certifiable class of persons. Right of access to the court system is clearly a due process issue between a citizen and his government; exactly as the statute indicates. Equal protection would require such an animus. It is not mentioned.

However, we suggest that the burden has been met in this case. This is a special group of working men and women; ones who, traditionally are and have been subject to special Congressional, state and judicial protection: seamen, offshore workers, workers on the high seas, workers in the oil drilling industry. This "discrete class of workingmen"[16] has been so singled out as to be declared

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[16] *Britt* v. *Suckle*, Id. p. 10.

wards of the court in Jones Act cases. These persons are mostly working in the federal sphere under the Jones Act, the Longshoremen and Harbor Workers Compensation Act and other off-shore regulations. They are part of the vast network of protections for the working class; a class considered in and of itself a special class. Any conspiracy directed toward them or to a specialized and protected group within the larger class, is a conspiracy that includes an invidious discriminatory animus.

The *Britt* language reveals that a discrete class of working men *IS* a covered class:

> "Where state law has singled out this class as deserving of state protection and defendants have sought to circumvent that protection, it is manifest that their conduct and motivation is invidious and class-based. It is likewise worthy of recall that workers have traditionally been thought of as a class, especially when their interests have conflicted with those of their employers. This discrimination against workers by employers, being a time-honored example of class-based discrimination, would seem plainly to fall within the *Griffin* analysis."

Thus, while denying that the *Griffin* analysis is necessary to a section 1985(2) action, petitioner suggests that the protected class of working men involved *IS* a class for purposes of invoking a section 1985(2) action.

There is nothing more critical to American society than one's right to enjoy life and pursue happiness, which includes the right to employment. In *Griffin*, the Court found that the right to interstate travel was a constitutionally guaranteed right — can the right to hold a job and support your family be any less?

The "independent illegality" requirement mentioned in *Britt* and others is one that, we suggest, is met by the

instant Petitioners. The statute itself speaks to the conspiracy to obstruct justice as being actionable, but *McClellen* v. *Mississippi Power and Light Co.*[17] requires that the alleged acts of the defendants be illegal, independently of section 1985(3). That court was looking to the "equal protection of the laws" language in section 1985(3). While again suggesting that instant Petitioner does not have to meet this burden under section 1985(2), under the statutes that determine the status and recovery for many of these workers, the conspiracy alleged herein would have an independently illegal base. Namely, the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 948(a) which provides:

> "Discrimination against employees who bring proceedings; penalties; deposit of payments in special fund; civil actions; entitlement to restoration of employment and compensation, qualifications requirement; liability of employer for penalties and payments; insurance policy exemption from liability.
>
> It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this chapter. Any employer who violates this section shall be liable to a penalty for not less than $100 or more than $1,000, as may be determined by the deputy commissioner for deposit in the special fund as described in the appropriate United States district court. *Any employee so discriminated against shall be restored to his employment and shall be compensated by his employer for any loss of wages arising out of such discrimination:* Provided, that if such employee shall cease to be qualified to perform the duties of his

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[17] *McClellen* v. *Mississippi Power and Light Company*, 545 F.2d 919 (5th Cir. 1977).

> employment, he shall not be entitled to such a restoration and compensation. The employer alone and not his carrier shall be liable for such penalties and payments. Any provision in an insurance policy undertaking to relieve the employer from the liability for such penalties and payments shall be void." (emphasis added)

The foregoing statute became effective thirty days after October 27, 1972. Versie Kimble was dismissed from his employment by D. J. McDuffy, Inc. subsequent to the effective date of the Act. Also the Act permits both civil and criminal sanctions.

The Outer Continental Shelf Lands Act, 43 U.S.C. 133, provides, in part:

> "An Act to provide among other things that the Longshoreman's and Harbor Workers' Compensation Act be extended to employees working on the Outer Continental Shelf in the exploration and development of natural resources.
>
> (b) The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with an operation conducted on the outer Continental shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources of the subsoil and seabed of the outer Continental Shelf, and proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent State nearest the place where the cause of action arose.
>
> (c) With respect to disability or death of an employee resulting from any injury occurring as the result of operations described in subsection (b) of this section, compensation shall be payable under the provisions of

the Longshoreman and Harborworkers' Compensation Act."[18]

The Fifth Circuit in *Smith* v. *Atlas Off-Shore Boat Service, Inc.*, decided August 21, 1981, held that seamen have a cause of action under General Maritime law for retaliatory discharge because of the filing of suit.

The above statutes and cases satisfy the independent illegality requirement of *McClellen*, if, indeed such requirement under section 1985(2) or necessary at all.

The workingmen language in *Smith* and *Britt*, and the special protections afforded seamen and the like, satisfy the *Griffin* invidious discriminatory animus requirements whether or not 1985(2) demands them under a 1985(3) analysis.

There has been no real dispute as to Congressional power under the Constitution to reach defendants' alleged conduct. The trial court found the power to do so and this has not been in dispute since. The title of the statute itself includes "and for other purposes" thus the question concerning Fourteenth Amendment problems do not have to be reached.

The courts below allude to the alleged problem of creating a mass of Federal tort law, thus opening the gates to any group of people who have a problem of any kind. We suggest this just isn't true. In order to come within the purvue of this statute, one must have a conspiracy of two or more persons to obstruct justice and some damage to persons or property in order to seek redress. The Lower Courts' fears of a flood of suits, all of which avail themselves of the statute in question, are fears which they themselves can resolve; requirements have to be met and basic

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[18] .... F.2d ...., ... slip p. 1047.

rights have to be infringed upon. Tort suits between two persons with grievances will still be tort suits; nothing more.

When agencies such as the Industrial Foundation of the South use the court system itself to deprive the people of jobs, there is a very real hardship of being thrown out of work or being unable to find employment for doing nothing more than pursuing their rightful remedies. In situations such as these, the records of the court become the means to subvert a citizen's right of access to the courts; public records not being used for information but to take away the right to work. A person's Social Security number and name become the means of indexing the worker. These files, compiled from court records, are not reported in order to aid a prospective employer in evaluating the worker's present health and ability to do a job. The court's records, fed into the index system, are presently being used to blacklist workers who have availed themselves of their rights—fundamental rights guaranteed to them by the Constitution and 42 U.C.S. 1985(2).

We suggest that when even one citizen's right to access to the court system is subverted into a Hobbes' choice of redress for grievances and injuries on the job and no job or just keep quiet and suffer, justice is not being served. When a class as large as this one faces these choices daily, a monstrous injustice is being perpetuated.

CERTIFICATE

I hereby certify that I have this date served a copy of this brief on D. J. McDuffy, Inc., and Industrial Foundation of the South and all of its subscribers, all parties at interest, by hand delivering same to their attorneys Harry S. Redmon, Jr., Rutledge C. Clemett, Jr., and Margaret Ann Brown of the law firm of Phelps, Dunbar, Marks, Claverie & Simms, 1300 Hibernia Bank Building, New Orleans, Louisiana 70112, and on attorney George J. Petrovich, by certified mail, postage prepaid, and properly addressed to him at his offices, 6000 Camp Bowie Blvd., Suite 192, Fort Worth, Texas 76116, all in accordance with the Rules of this Court.

New Orleans, Louisiana, this 15th day of September 1981.

LAWRENCE D. WIEDEMANN
Attorney for Versie Kimble
Plaintiff-Appellant

APPENDIX A

42 U.S.C. 1985(2)

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

SECTION 1985(3)

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his

support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as a elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

CONSPIRACY ACT OF 1861, 12 STAT. 284

Section 1980(2). Conspiracy: Second

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grant or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

KU KLUX KLAN ACT OF 1871, 17 STAT. 13

Chapter 22, Section 2:

An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes. Section 2: That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force the authority of the government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take or possess any property of the United States contrary to the authority thereof, or by force, intimidation, or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States, or from discharging the duties thereof, or by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or to injure his person while engaged in the lawful discharge of the duties of his office, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duty, or by force, intimidation, or threat to deter any party or witness in any court of the United States from attending such court, or from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such party or witness in his person or property on account of his having so attended or testified, or by force, intimidation, or threat to influence the verdict, presentment, or indictment, of any juror or grant juror in any court of the United States, or to injure such juror in his person or property on account of any verdict, presentment, or indict-

ment lawfully assented to by him, or on account of his being or having been such juror, or shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal priviliges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or shall conspire together for the purpose of in any manner impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, or by force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful manner towards or in favor of the election of any lawfully qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy, each and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States or district or supreme court of any Territory of the United States having jurisdiction of similar offences, shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine. And if any one

or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges, against any one or more of the persons engaged in such conspiracy, such action to be prosecuted in the proper district or circuit court of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts under the provisions of the act of April ninth, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication."

UNITED STATES CODE, TITLE 33

Section 948(a): Longshoremen's and Harbor Workers' Compensation Act

Discrimination against employees who bring proceedings; penalties; deposit of payments in special fund; civil actions; entitlement to restoration of employment and compensation, qualifications requirement; liability of employer for penalties and payments; insurance policy exemption from liability.

It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this chapter. Any employer who violates this section shall be liable to a

penalty for not less than $100 or more than $1000, as may be determined by the deputy commissioner for deposit in the special fund as described in the appropriate United States district court. Any employee so discriminated against shall be restored to his employment and shall be compensated by his employer for any loss of wages arising out of such discrimination: Provided, that if such employee shall cease to be qualified to perform the duties of his employment, he shall not be entitled to such a restoration and compensation. The employer alone and not his carrier shall be liable for such penalities and payments. Any provision in an insurance policy undertaking to relieve the employer from the liability for such penalties and payments shall be void.

Effective 30 days after October 27, 1972.

UNITED STATES CODE, TITLE 43

Section 133, in part

An Act to provide among other things that the Longshoreman's and Harbor Workers' Compensation Act be extended to employees working on the Outer Continental Shelf in the exploration and development of natural resources. (b) The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with an operation conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the Outer Continental Shelf, and proceeding with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent State nearest the place where the cause of action arose. (c) With respect to disability or death of

an employee resulting from any injury occurring as the result of operations described in subsection (b) of this section, compensation shall be payable under the provisions of the Longshoreman's and Harborworkers' Compensation Act.

THE CONSTITUTION, ARTICLE III

The Judiciary

Section 1

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2

The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to controversies between two or more states; — between a State and Citizens of another State; — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Counsels, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all

the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such place of Places as the Congress may by law have directed.

Section 3

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on confession in open Court.

The Congress shall have Power to declare the Punishment to Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

THE CONSTITUTION, ARTICLE I

Section 8. the "necessary and proper" clause

To make all Laws which shall be necessary and proper for carrying into Execution of the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

THE CONSTITUTION, AMENDMENT X

Reserved Powers to States

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

THE CONSTITUTION, AMENDMENT XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

***Versie Kimble, and all other similarly situated* v. *D. J. McDuffy, Inc. and Industrial Foundation of the South, and all of its subscribers*, Civ. A. No. 73-1416, United States District Court, E. D. Louisiana, Jan. 24, 1978, 445 F. Supp. 269 (1978).**

Lawrence D. Wiedemann, Wiedemann & Fransen, New Orleans, La., for plaintiff.

George J. Petrovich, Jr., Dixon & Petrovich, Fort Worth, Tex., Harry S. Redmon, Jr., and Rutledge C. Clement, Jr., Phelps, Dunbar, Marks, Claverie & Sims, New Orleans, La., for D. J. McDuffy, Inc. and Industrial Foundation of the South and all of its subscribers, defendants.

ALVIN B. RUBIN, Circuit Judge.*

The fallout following the fusion of new views with the interpretation of an ancient statute generates mutations and sometimes new forms of legal right. Here we are concerned with the extent of change wrought in the Federal Conspiracy to Obstruct Justice Act[1] as a result of the reinterpretation of a related statute, commonly known as the Ku Klux Klan Act, in *Griffin* v. *Breckenridge*, 1971, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338. Each of these reconstruction era statutes now forms part of Section 1985, U.S.C., Title 42. The issue is whether the Obstruction of Justice Conspiracy Act, thus reinterpreted in the light of *Griffin*, grants a cause of action for an alleged conspiracy among private persons not to employ someone who has made a claim for personal injury.

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* Sitting as District Judge by special designation of Chief Judge John R. Brown.

[1] 42 U.S.C.A. § 1985(2).

I.

The interpretation of the statute determines the ruling on the defendants' motion for summary judgment. In the normal course, summary judgment will be granted only when there is no genuine dispute concerning any material fact.[2] In the present case, the plaintiffs have failed to respond fully to the defendants' motion and supporting affidavits as required by Rule 56, Federal Rules of Civil Procedure. Nonetheless, rather than delay matters further in this suit instituted in 1973, now already almost five years old, we shall assume that the plaintiffs might adduce additional affidavits or depositions to support what they contend in briefs and unverified factual statements. The issue is whether, given the benefit of the assumption that these could be proved, and that all inferences favorable to the plaintiffs would be drawn from them, the defendants are nonetheless entitled to judgement as a matter of law. *Adickes* v. *S. H. Kress & Co.*, 1970, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142; *U.S.* v. *Diebold, Inc.*, 1962, 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176; *Tyler* v. *Vickery*, 5th Cir. 1975, 517 F.2d 1089; *Pitts* v. *Shell Oil Company*, 5th Cir. 1972, 463 F.2d 331; *Croley* v. *Matson Navigation Co.*, 5th Cir. 1970, 434 F.2d 73; *Gross* v. *Southern Ry. Co.*, 5th Cir. 1969, 41 F.24d 292; also, *see* Wright and Miller, Federal Practice and Procedure, chap. 8, § 2727, p. 526. Acknowledging that the defendants, who seek summary judgment, will concede little of the following to be undisputed, and will argue that much of it is not true or not material, we begin with a resume of the facts that the plaintiffs contend they could prove.

In 1969, Mr. Kimble sustained an injury to his right shoulder while working for Noble Drilling Company. He filed a suit for damages in this court. It resulted in a jury

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[2] Fed.R.Civ. Proc. Rule 56.

verdict in his favor for $35,000. In December, 1972, he began work for McDuffy. The following April, McDuffy fired him because it learned of his prior suit against Noble. He then sought work from other companies, here named as co-defendants; they refused to consider him because he had sued McDuffy. He later learned that Industrial Foundation of the South (IFS), a corporation, engages in collecting data for the oil industry, including information concerning personal injury claims. IFS furnishes its members, all of them employers in the oil drilling industry, with the names of those persons who have either made a claim for personal injuries or filed a suit against any company in that industry for personal injuries connected with their employment. This suit is brought as a class action on behalf of all other persons who sought employment in the offshore industry and were denied it because their names had been placed into the IFS suit index system as a result of a personal injury claim or lawsuit, whether or not the claim was for a tort or for workmen's compensation, whether it was based on state or federal law, and whether or not it resulted in the filing of litigation. The suit seeks an injunction against the continuance of these practices. Class action status with respect to the damage claims has been denied; only Mr. Kimble now seeks damages.

For the reasons stated, the version of the facts most favorable to the plaintiffs has been assumed. Defendants have, however, presented affidavits and other evidentiary matter tending to support a different view: they say that neither Mr. Kimble nor anyone else has ever been denied employment because of the assertion of a claim. Companies in the oil industry must assure themselves that their employees are in good physical condition. In their employment applications, these companies inquire whether the applicant has ever been injured. The question is frequently answered in the negative by applicants who have, in fact,

been injured and are thus not suitable for employment.

The IFS collects data concerning persons who have asserted claims for injuries during employment so that prospective employers may have accurate information by which to evaluate the physical condition of an applicant and the truthfulness of his application. But for present purposes, we postulate the plaintiffs' version.

II.

The plaintiff's claims are founded entirely on the Federal Conspiracy to Obstruct Justice Act, § 1985(2),[3] which creates four separate causes of action. They are more fully analyzed below. However, one of these is a conspiracy, defined in the statute as follows:

> If two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws . . .

Thus, the statute applies if (1) two or more persons conspire (2) for the *purpose* of impeding the due course of

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[3] No attempt is made to invoice admiralty jurisdiction. See *Carroll* v. *Protection Maritime Insurance Co., Ltd.*, 1st Cir. 1975, 512 F2d 4. Nor is any complaint made under the anti-trust laws. *Ibid.* There being no suggestion of diversity jurisdiction, we need not consider whether the conduct complained of might be tortious under state law. *See*, for example, ALI, The Restatement of Torts, 2d, § 766; W. Prosser, The Law of Torts, § 129 at 927 (4th ed. 1971). See also *Cust* v. *Item Company*, 1942, 200 La. 515, 8 So. 2d 361; *New Orleans Opera Guild* v. *Local 174, Musicians M.P.U.*, 1961, 242 La. 134, 134 So.2d 901; *Re-Steel, Inc.* v. *Haas and Haymie-Tudor Construction Company*, La. April 1977, 344 So.2d 969. Compare *Jacobson* v. *Industrial Foundation of the Permain Basin*, 5th Cir. 1972, 456 F.2d 258 (per curiam).

justice (3) with the *intent* to deny to any citizen the equal protection of the laws *or* (alternate 3) to injure him for lawfully enforcing the right of any person to the equal protection of the laws.

The plaintiffs' argument is that the conspiracy to deny them jobs because they had made claims for personal injuries was for the purpose of hindering, obstructing or defeating the due course of justice, and was entered into either:

> (a) for the purpose of depriving them of equal protection of the laws, or,
>
> (b) to injure them for lawfully enforcing or attempting to enforce their right to present their claims, in general, and, particularly, their right to file suit in federal court.

The statute does not in terms apply to every act, however conspiratorial, directed at a person for the purpose of impeding or obstructing justice. It reaches only those acts done with a specific intent, the intent to deny equal protection or to cause injury to individuals who have lawfully enforced their rights to equal protection.

The plaintiffs do not invoke Section 1985(3), the Ku Klux Klan Act. However, the two sections are intimately related. Part of the Ku Klux Klan Act has recently been interpreted by the Supreme Court; as that interpretation must serve as the genesis for determining the interpretation of the remainder of Section 1985, we gain insight by examining Section 1985(3).

With deletion of those parts that are not involved here, the Ku Klux Klan Act reads:

> If two or more persons . . . conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any

> person or class of persons of the equal protection of the laws . .; [and] in any case of conspiracy set forth in this section; if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages . . .

Thus, that Act purports to deal with either a conspiracy to deprive others of equal protection of the laws or going in disguise for that purpose. Of course, the conspiracy, to be actionable, must be followed by an overt act.

The issue in *Griffin* was whether this statute created a cause of action for damages against private persons for their own conduct not associated with official state action. Holding that the statute reaches actions by private individuals, the court said that the sweep of the statute is "as broad as [its] language." 403 U.S. at 97, 91 S.Ct. at 1796. It protects equal privileges and immunities under the laws "from invasion by private persons." *Ibid.*

But this "does not, however, mean," it continued, "that it was intended to apply to all tortious, conspiratorial interferences with the rights of others." 403 U.S. 101—2, 91 S.Ct. at 1798. "The constitutional shoals that would lie in the path of interpreting Section 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose — by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. . . . [T]he language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps, otherwise class-based animus behind the conspiratorial actions. The conspiracy,

in other words, must aim at a deprivation of the equal employment of rights secured by the law to all."

[1] The animus requisite for an action under the Ku Klux Klan Act must, therefore, be directed against a group ("class") having common characteristics of an inherent nature, not a congeries of persons who become a "class" by virtue of the denial to them of some advantage or their involvement in a single common kind of action. Otherwise, as *Griffin* and several other cases[4] have admonished, this section would be converted into a general tort law whenever the wrongful conduct is directed at more than a single person.

III.

Omitting the portions applicable to juries and jurors, Section 1958(2) includes four separate clauses. Each has a different thrust, so each must be separately analyzed. It applies:

> A. If two or more persons conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein . . . or
>
> B. to injure such party or witness in his person or property on account of his having so attended or testified, or
>
> C. if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or

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[4] *McLellan* v. *Mississippi Power and Light Co.*, 5th Cir. 1977, 545 F.2d 919, 924, 928-9 (en banc); *Lopez* v. *Arrowhead Ranches*, 9th Cir. 1975, 523 F.2d 924; *Jackson* v. *Cox*, 5th Cir. 1976, 540 F.2d 209; *Cohen* v. *Illinois Institute of Technology*, 7th Cir. 1975, 524 F.2d 818, 829; *Arnold* v. *Tiffany*, 9th Cir. 1973, 487 F.2d 216, 218-19, cert. denied, 415 U.S. 984, 94 S.Ct. 1578, 39 L.Ed.2d 881.

> D. to injure him or his property for lawfully enforcing . . . the right of any person, or class of persons, to the equal protection of the laws.

We turn first to the clauses listed above as C and D. Clause C refers to a conspiracy entered into with a specific intent: "to deny to any citizen the equal protection of the laws;" Clause D similarly refers only to a conspiracy directed at a person because the victim lawfully enforced the right of any person or class of persons to equal protection.

[2, 3] Though *Griffin* dealt only with the Klan Act, its rationale applies to the Conspiracy to Obstruct Justice Act, which has also been made a part of Section 1985. To demonstrate an intent to deny equal protection of the laws requires showing something more than the denial to one person or to several persons of a right that is enforceable by others. Thus, many courts have concluded that the Conspiracy to Obstruct Justice Act should be interpreted in the same manner. *See,* for example, *Hahn* v. *Sargent,* 1st Cir. 1975, 523 F.2d 461, 469; *Smith* v. *Yellow Freight System, Inc.,* 10th Cir. 1976, 536 F.2d 320, 1323; *Stern* v. *United States Gypsum, Inc.,* 7th Cir. 1977, 547 F.2d 1329, 1341; *Shaw* v. *Garrison,* E.D.La. 1975, 391 F.Supp. 1353, 1370-71, *aff'd,* 545 F.2d 980; *Jones* v. *United States,* E.D.Ark. 1975, 401 F.Supp. 168, 172-3, *aff'd,* 8th Cir. 1976, 536 F.2d 269, 271; *Cartolano* v. *Tyrrell,* N.D.Ill.1976, 421 F.Supp. 526, 531-2; *Kelly* v. *Foreman,* S.D.Tex.1974, 384 F.Supp. 1352. The Act does not reach all conspiracies to obstruct justice but only those entered into with the specific intent or for the purpose stated in it.

In the present case no claim is made that the defendants were motivated by any racial or class-based animus, as those terms were intended in *Griffin.* No racial animus by the defendants is even intimated. The only "class" that is suggested as a possible target of their conspiracy is one

composed, broadly, of all oil industry workers who make any claim for personal injury in any fashion.

Personal injury claimants are a class of people for some purposes. A group of personal injury claimants has been held to be a class in this lawsuit for purposes of a class action. There is a community of interest in this group that warrants treating it as a class for purposes of a class action. But the only characteristic this class shares is that of making a claim; this makes it a class within the meaning of that word as used in Rule 23 of the Federal Rules of Civil Procedure. It does not follow, however, that animus against such a group can be considered class-based. They share no other trait — racial, religious, ethnic, sexual, geographic, or economic.

[4] The coincidence that the single word "class", is used to describe both kinds of groups cannot justify converting a homonym into a legal identity of the different meanings. When the court in *Griffin* suggested that "perhaps . . . class-based animus" might suffice to activate the Ku Klux Klan Act, it did not intend to sweep into that Act any conspiracy that was aimed at two or more people with a single common trait. If the statute were that panoramic, then a conspiracy directed at pedestrians who walk on a certain street, at motorists who drive on a particular road, or at people who wear blue shirts, would be equally embraced.

This is why the court said, in *Lopez* v. *Arrowhead Ranches*, 9th Cir. 1975, 523 F.2d 924, 928:

> As *Griffin* narrowed the cases in which a deprivation of equal rights is actionable to those where the injury is class motivated, it seems to us a necessary corollary that the class animus alleged be consistent with the deprivation of rights alleged . . . Of itself, the creation of a class of victims by tortious conduct does not bring a claim within § 1985(3); such a class is created by every tort. Plaintiffs have not and cannot allege, as

> they must if they would succeed, anything to distinguish them as intended victims other than that they belong to the class possessing the rights deprived — a circumstance true of all potential employees involved. Under *Griffin* we think the class status providing the motivating animus must be created by a fact other than the possession of the right deprived — otherwise virtually every conspiratorial deprivation of a primary right would be actionable under § 1985(3) regardless of the pertinent statutory enforcement provisions.

IV.

[5] Because, then, the plaintiffs have not alleged or shown any conspiracy entered into with intent to deny them or any class to which they belong equal protection of the law, or to injure them for lawfully expressing the right of any person to equal protection of the law,[5] summary judgment will be entered as to those parts of the claim that rest on Clauses C and D of the statute.

[6] The plaintiffs also rely on the first clause of the Conspiracy to Obstruct Justice Act, which deals with conspiracies to deter parties or witnesses from attending or testifying in court. No factual evidence has been adduced nor has even any allegation been made that any defendant attempted to deter or intimidate any witness or party by force, intimidation, or threat. In *Brawer* v. *Horowitz*, 3rd Cir. 1976, 535 F.2d 830, 840, the court said:

> We understand the first part of § 1985(2) to concern itself with conspiratorial conduct that *directly* affects or seeks to affect parties, witnesses or grant or petit

[5] Because we do not find that plaintiffs have stated a claim under the second two clauses of Section 1985(2), insofar as they lack the requisite element of class-based animus, we need not consider the possible constitutionality of a statute that creates a federal cause of action against private parties for impeding justice in a state or territory or for injuring a person for lawfully enforcing his rights.

> jurors. The allegations of this complaint are different in kind . . . We deem this 'influence' to be too remote to fit within the intended ambit of § 1985(2).

It is contended that the defendants' conspiracy was designed to prevent the hiring of anyone who had worked in the oil industry and had asserted a personal injury claim. If this conspiracy had been made known to claimants before they filed their claims, it might have deterred persons from making claims or filing lawsuits on them. But the conspiracy is alleged to have been covert; it could, under the charges made, have been only retaliatory. If it were only covert and retaliatory, it could not have deterrent effect. Even if it was known in advance to the victims, the conspiracy described was not directed at persons who attended or testified in a court of the United States; it was directed at those who made claims whether or not these resulted in any action in a federal court ("a court of the United States").

By contrast, the plaintiff in *Kelly* v. *Foreman*, S.D.Tex. 1974, 384 F.Supp. 1352, alleged *inter alia* that he was intimidated and threatened in order to cause him to refuse to give information to law enforcement officers, and, more on point, to refuse to testify against certain of the defendants. In the present case, it may be urged that the plaintiffs have now revealed the conspiracy and that, in the future, it will have deterent effect. But the suit is predicated on the tort alleged to have occurred in the past, when the plan was secret.

The plaintiffs' claim under the second clause, "B", of Section 1985(2) is no more successful. The Conspiracy to Obstruct Justice Act does not create a claim for every conspiracy entered into with intent to deny a citizen access to a court, or to retaliate against a citizen for his utilization of the federal court system. If they are to come within the plain language of the statute, plaintiffs must allege that they were injured on account of having *attended* or *testified*

in federal court. This they have not done. They allege that they suffered injury on account of having filed claims in federal court, or in state court, or with workmen's compensation boards created under federal or state law. Nowhere do they contend that defendants discriminated against them — "blacklisted" them — on account of their attendance or testimony in federal court. They reiterate, indeed, that such discrimination was casually related to the *filing* of claims.[6] At most, the conspiracy charged was aimed at injuring the plaintiffs on account of their having asserted a claim or filed a lawsuit. Congress did not undertake to make that behavior actionable.[7]

[7] It can be argued with some cogency that the Congress out to protect access to all federal courts, and make it tortious for anyone to retaliate against a person for using those courts. But Section 1985(2) does not, in its broadest possible reading, prohibit such conduct. Because the action is based on a statute, we need not consider the extent to which the Constitution may implicitly compel the government to provide unrestricted access to federal courts or the question whether the denial of any such

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[6] See Plaintiff's Complaint, p. 1; Memorandum in Support of Certification of the Class, pp. 1, 5, 11, 13, 14, 18; Plaintiffs' Second Supplemental Memorandum in Opposition to Motion to Dismiss, p. 2.

[7] Furthermore, plaintiffs have not adduced any evidence of retaliatory motivation. It is not alleged in their complaint; indeed, only twice in their many submitted papers to this court did they contend that there was any motivation of a retaliatory, rather than a purely economic, nature. (Plaintiff's Memorandum in Opposition to Motion to Dismiss, p. 1.) The statute requires a conspiracy to injure on account of federal court activities. If defendants' conduct is explained in purely self-interested economic reasons, then the injury to the plaintiffs cannot be said to be the aim of their behavior, but is an incidental result of an employment policy that is, at worst, "callous," as plaintiffs assert elsewhere. Compare *Crawford* v. *City of Houston, Texas*, S.D.Tex.1974, 386 F.Supp. 187.

right would create a cause of action for damages in tort. *See United States* v. *Kras*, 1973, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626, involving an unsuccessful challenge to the constitutionality of exacting a filing fee before bankruptcy proceedings could be commenced where the constitutional nexus (the Bankruptcy Clause) was held insufficient to ground an individual right.

There is little doubt that the Constitution grants authority to the Congress to enact legislation that would prohibit retaliation against a person for resorting to federal court. In the Conspiracy to Obstruct Justice Act it has undertaken to make actionable conduct aimed at deterrence of, or retaliation for, attendance or testimony in federal court; it might go further and forbid retaliatory conduct aimed at the filing of a federal lawsuit or assertion of a federal claim.[8] Whether or not it has the power to make it a federal tort to retaliate against a person for resorting to state legal procedures is an issue that need not be faced here. There is no federal tort law. Nor does the plaintiffs' suit rely upon general tort law. State law may — or may not — make tortious the kind of conduct alleged. Plaintiffs' cause of action in this court, however, rests on Section 1985(2),

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[8] Compare the Federal Juror's Act, which at present does not prohibit a private employer from discharging an employee who is called to jury service. Congress now has under consideration a Senate Bill, S. 2075, and a House Bill, H.R. 7810; § 61875 of both, "Employment Rights", would make such discharge a federal offense.

and that statute does not extend to the action complained of.[9]

For these reasons, the motion for summary judgment is GRANTED, without prejudice to the rights that the plaintiffs may have, if any, under state law.

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[9] The constitutional source of Congressional authority to enact these federal court-related clauses of Section 1985(2) was noted by the Third Circuit in *Brawer* v. *Horowitz, supra.* "The first half of (2) aims at conspiracies the object of which is intimidation of or retaliation against parties or witnesses, grand or petit jurors, in any court of the United States. The federal nexus, then, is not the class-based, invidiously discriminatory animus required by the second half of the subsection, but the connection of the proscribed activities to a federal court." Article III of the Constitution establishes "The judicial Power of the United States." Article I, § 8, cl, 18, gives to Congress the power "To make all laws, which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States . . ."

Because the issues discussed are sufficient to dispose of the case, we do not reach the further question, whether to constitue a violation of Section 1985(2), it must be shown that the acts performed were independently illegal apart from the Section 1985(2) prohibition. *See McLellan* v. *Mississippi Power and Light Co.*, 5th Cir. 1977, 545 F.2d 919, 925-7 (en banc).

APPENDIX C

***Versie Kimble, Plaintiff-Appellant, v. D. J. McDuffy, Inc. and Industrial Foundation of the South, and all of its subscribers, Defendants-Appellees*, No. 78-1474 United States Court of Appeals, Fifth Circuit, Aug. 14, 1980, 623 F.2d 1060.**

Lawrence D. Wiedemann, New Orleans, La., for plaintiff-appellant.

Phelps, Dunbar, Marks, Claverie & Sims, Harry S. Redmon, Jr., Rutledge C. Clement, Jr., Margaret Ann Brown, New Orleans, La., George J. Petrovich, Jr., Fort Worth, Texas, for defendants-appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before TUTTLE, AINSWORTH and SAM D. JOHNSON, Circuit Judges.

SAM D. JOHNSON, Circuit Judge:

Tales of the violence of white sheeted Southerners prompted Congress to pass the Ku Klux Klan Act of 1871. Today this Court is asked to decide whether one of the offspring of that Act, 42 U.S.C. § 1985(2),[1] provides relief for individuals who allege they are unable to obtain employment in the oil drilling industry because they filed personal injury claims against companies in that industry. The district court, 445 F.Supp. 269, held as a matter of law that the statute does not cover this alleged blacklisting and granted summary judgment for defendants. We affirm in part and reverse in part.

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[1] 42 U.S.C. § 1985(2) is known as the Federal Conspiracy to Obstruct Justice Act.

I. THE FACTS

The Industrial Foundation of the South (the Foundation) is a non-profit corporation that assists its member companies, all affiliated with the oil industry, in making personnel decisions. Specifically, the Foundation checks court records in Louisiana, Texas, Mississippi, Alabama, Oklahoma, New Mexico, and Missouri to discover all claims filed against companies in the oil industry for injuries resulting from employment.[2] The Foundation then compiles a list of the individuals who have filed suit in federal or state courts, as well as those who have sought workers' compensation pursuant to federal or state law.[3] Whenever someone applies for employment with one of the approximately 300 subscribers to the Foundation's services, the person handling the job application notifies the Foundation and provides the Foundation with the prospective employee's name and social security number.[4] The Foundation searches through its one-half million records and supplies the requesting company with any pertinent information that it has on the applicant. Using this information as a guideline, the employer then makes an appropriate employment decision.

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[2] The Foundation hires various individuals to examine the court records. Some of those who examine the records are salaried employees. The majority are district clerks and assistants to district clerks; who are paid a sum of money for each case they report to the Foundation. Deposition of H. J. Robinson at p. 84-86. The proprietary of this conduct by federal employees is not before this Court.

[3] The Foundation's records contain more than just a list of the names of individuals who have filed personal injury actions against oil companies. The records include the person's name; the nature of the injury; the amount of money sought; the name of the employee; the name of the insurance company; and the attorneys for both the plaintiff and defendant.

[4] The general manager of the Foundation indicated that the Foundation received approximately 92,000 requests per year in 1973. Deposition of H. J. Robinson at p. 82.

One of the individuals whose record may be found in the Foundation's files is the named plaintiff in this cause of action, Versie Kimble. In 1969 Kimble injured his right shoulder while working for Noble Drilling Company. He filed suit in federal court and, after a jury trial, recovered $35,000. In December 1972, Kimble began working for D. J. McDuffy, Inc. (McDuffy), a now-defunct oil well service company. At the time McDuffy hired Kimble, the company was not a member of the Industrial Foundation of the South. In March 1973 McDuffy joined the Foundation. Shortly thereafter, in early April, McDuffy fired Versie Kimble. McDuffy contended that it terminated Kimble because he was about to seek political office. Kimble claims he was fired because of his prior suit against Noble Drilling Company.

On May 13, 1973, Versie Kimble filed this class action on behalf of all individuals who had been denied employment by Foundation members because they had filed workers' compensation or personal injury claims against companies affiliated with the oil drilling industry. The defendants included D. J. McDuffy, Inc., the Industrial Foundation of the South, and all members of the Foundation. The complaint, based entirely on 42 U.S.C. § 1985(2),[5] sought

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[5] 42 U.S.C. § 1985(2) provides:

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or *to injure such party or witness in his person or property on account of his having so attended or testified*, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror, or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of

damages for the class and a permanent injunction enjoining defendants from continuing their allegedly unlawful practices.[6] The district court denied class action status with respect to the damage claim, but certified the class with respect to the claim for injunctive relief.

In January 1978 the district court considered the defendants' motion for summary judgment. The district court gave plaintiffs the benefit of all assumptions and drew all inferences in favor of the plaintiffs. After throughly examining Section 1985(2), the district court concluded that the statute does not cover the actions that plaintiffs complained of, and held that the defendants were entitled to judgment as a matter of law. *Kimble* v. *D. J. McDuffy, Inc.*, 445 F. Supp. 269 (E.D.La.1978). Plantiffs then instituted this appeal.

II. STATUTORY HISTORY

The starting point for delineating the coverage provided by section 1985(2) is the section's statutory roots. *See Brawer* v. *Horowitz*, 535 F.2d 830 (3rd Cir. 1976). The parent of Section 1985 is Section 2 of the Ku Klux Klan Act.[7] Act of April 20, 1871, Ch. 22, § 2, 17 stat. 13. In 1874,

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the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce the right of any person, or class of persons, to the equal protection of the laws;

[6] As the district court noted, plaintiffs have not invoked admiralty jurisdiction, the antitrust laws, nor diversity jurisdiction. *Kimble* v. *D. J. McDuffy, Inc.*, 445 F.Supp. 269, 272 n. 3 (E.D. La.1978).

[7] Section 2 of the Ku Klux Klan Act provided:

Sec. 2. *That if two or more persons within any State or Territory of the United States shall conspire together* to overthrow, or to put down, or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force the authority of the government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or posses any property of the United States

pursuant to Congressional authorization, Secretary of State Hamilton Fish supervised the revision and publication of all the statutes of the United States. During the course of that revision, minor grammatical changes were made and Section 2 of the Ku Klux Klan Act was reformulated into three subsections. *Brawer* 535 F.2d at 838, 839. The reformulated version of Section 2 of the Ku Klux Klan Act made its way into the revised statutes as Section 1980. The current language of Section 1985, including Section 1985(2), is taken verbatim from Revised Statutes § 1980, Second.

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contrary to the authority thereof, or by force, intimidation, or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States, or from discharging the duties thereof, or by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or to injure his person while engaged in the lawful discharge of the duties of his office, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duty, or *by force, intimidation, or threat to deter any party or witness in any court of the United States from attending such court, or from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such party or witness in his person or property on account of his having so attended or testified, or by force, intimidation, or threat to influence the verdict, presentment, or indictment, of any juror or grand juror in any court of the United States, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or an account of his being or having been such juror,* or shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or *shall conspire together for the purpose of in any manner, impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with*

Section 1985(2) was once part of a unitary statutory scheme designed to protect individuals from a wide range of conspiracies. Thus, in seeking to interpret the language of Section 1985(2), courts must be guided by prior interpretations of similar language found in Section 2 of the Ku Klux Klan Act, specifically those provisions that today constitute 1985(1) and (3).

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intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, or by force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful manner towards or in favor of the election of any lawfully qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy each and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States or district or supreme court of any Territory of the United States having jurisdiction of similar offences, shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine. And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy, such action to be prosecuted in the proper district or circuit court of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts under the provisions of the act of April ninth, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication."

Those parts of Section 2 that today constitute Section 1985(2) are emphasized.

III. THE SECTION 1985(2) CAUSE OF ACTION

A. Analytical Framework

The issue before this Court is whether plaintiffs produced sufficient evidence to survive defendants' motion for summary judgment. A careful analysis of the various provisions of Section 1985(2) and an application of the facts to those provisions is required in order to resolve this question. In conducting this examination, we must approach the "perfidious syntax" of Section 1985(2) with some care. *Brawer,* 535 F.2d at 837. The statute contains several different provisions, no two of which are directed at the same type of conspiracy. As the district court noted, when one omits the clauses in Section 1985(2) that are applicable to juries and jurors (and inapplicable in the case at bar), subsection 2 contains four clauses that create four distinct causes of action:

> A. If two or more persons conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein . . . or
>
> B. to injure such party or witness in his person or property on account of his having so attended or testified, or
>
> C. if two or more persons conspire for the purpose or impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or
>
> D. to injure him or his property for lawfully enforcing . . . the right of any person, or class of persons, to the equal protection of the laws.

445 F.Supp. at 274. In determining whether plaintiffs' claim should have survived a motion for summary judg-

ment, this Court must examine each of these four clauses individually.

B. Clause C

[1] Clause C of Section 1985(2) is aimed at conspiracies designed to obstruct "the due course of justice in any State or Territory." The conspiracy must be entered into with the intent to deny "equal protection of the laws . . . ." The district court held that plaintiffs failed to allege or show a conspiracy entered into with the intent to deny them equal protection of the law. We agree.

Exactly what evidence is required to establish that defendants entered into a conspiracy with the intent of denying plaintiffs equal protection of the law is not readily apparent. The starting point for this inquiry must be the Supreme Court's interpretation of similar language from Section 1985(3) in *Griffin* v. *Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971). Although the Supreme Court in *Griffin* was focusing on the language of Section 1985(3), this Court has held that, in light of its statutory roots,[8] clause C is to be interpreted in accordance with *Griffin*. *Slavin* v. *Curry*, 574 F.2d 1256, 1262, *modified* 583 F.2d 779 (5th Cir. 1978).

Griffin involved an assault on blacks traveling a Mississippi highway by white private citizens. The attack was racially motivated — defendants acted on the mistaken belief that the plaintiffs were civil rights workers. The issue in *Griffin* was whether Section 1985(3) created a cause of action for damages against individuals acting in a purely private capacity.

The Court held that Section 1985(3) was designed to protect individuals from actions by private persons. The

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[8] See Section II, *supra*.

Court recognized, however, that Section 1985(3) was not "intended to apply to all tortious, conspiratorial interferences [by private parties] with the rights of others." *Id.* 403 U.S. at 101, 102, 91 S.Ct. at 1798. "The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, animus behind the conspiratorial actions." *Id.* at 102, 91 S.Ct. at 1798 (footnote omitted). Thus, since defendants in the case at bar are private parties, in determining whether plaintiffs have satisfied the requisites of clause C this Court must determine whether plaintiffs have established that defendants were motivated by the appropriate class-based, discriminatory animus.

We note from the start that not all classes of individuals fall within the protective cloak of clauses C. *See, e.g., McLellan* v. *Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (en banc) (persons who have voluntarily filed a bankruptcy petition are not a protected class); *Bricker* v. *Crane*, 468 F.2d 1228 (1st Cir. 1972), *cert. denied*, 410 U.S. 930, 93 S.Ct. 1368, 35 L.Ed.2d 592 (1973) (doctors who have testified against their brethren in malpractice cases are not a protected class). The class that plaintiffs allege is the target of defendants' conspiracy is one that includes workers employed in the oil exploration industry who have pursued some type of personal injury claim. While personal injury claimants are undoubtedly a class for some purposes, the question in the case at bar is whether Congress intended to proscribe a conspiracy to obstruct the due course of justice *aimed at personal injury claimants.* A careful review of Congressional intent and the subseqent jurisprudence establishes that Section 1985(2), clause C was not designed to protect this class of plaintiffs.

There are two distinct genres of classes protected by clause C. The first category is defined by some courts as one where the class is characterized by some inherited or immutable characteristic. Perhaps the better definition is that recently endorsed by the Ninth Circuit in *DeSantis* v. *Pacific Telephone & Telegraph Co., Inc.*, 608 F.2d 327 (9th Cir. 1979). The Ninth Circuit held that in determining whether a group of individuals satisfies the class requirement of 1985(3), federal courts have remained faithful to the basis principle underlying the adoption of Section 2 of the Klu Klux Klan Act: "The governmental determination that some groups require and warrant special federal assistance in protecting their civil rights." *Id.* at 333. *Cf. Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1963) (Although the civil rights statutes were enacted in response to post-war conditions in the South, they are cast in general language and provide for flexibility).

The Supreme Court focused on the most obvious of this type of protected class in *Griffin*, when the Court held that conspirators who acted with a racially discriminatory animus could be found to be in violation of Section 1985(3).[9] Lower federal courts have extended this first category beyond race to encompass those who are victims of a conspiracy due to their sex, *Life Insurance Company of North America* v. *Reichardt*, 591 F.2d 499 (9th Cir. 1979); *Curran* v. *Portland Superintending School Committee*, 435 F.Supp. 1063 (D.Maine 1977); religion, *Marlowe* v. *Fisher Body*, 489 F.2d 1057 (6th Cir. 1973); or national origin, *Id.*[10]

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[9] That Congress intended to protect those discriminated against due to race is evidenced by the title of the Act itself: "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes." 17 Stat. 13 (1871).

[10] Classes that have been and will be recognized as warranting special assistance in protecting their civil rights are not limited to the "suspect groups" of the fourteenth amendment.

Plaintiffs are unable to establish that Congress or the judiciary has displayed a special solicitude towards their class because of its need for assistance in enforcing its civil rights. While this Court recognizes that the protective scope of the Act is not static, a class composed of personal injury claimants does not fall within this first category of classes protected by Section 1985(2), clause C.

There is a second category of classes encompassed by Sections 1985(2) and (3). This category includes individuals who are victims of a conspiracy because of their political beliefs or associations.

That Congress intended to protect individuals who are conspired against because of their political beliefs or associations is beyond doubt. Although the Ku Klux Klan is today thought of as a racist organization, in 1871 it was primarily a political organization. The Republicans, who controlled the 42d Congress, found Klan violence especially troublesome because they were convinced that it was politically motivated. Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose,* 46 Univ.Chi. L.Rev. 402, 408 (1979). The majority report of the Senate Select Committee to Investigate Alleged Outrages in the Southern States reflected this concern: "[I]t is clearly established ... that the Ku Klux Organization does exist, has a political purpose, is composed of members of the democratic or conservative party, [and] has sought to carry out its purpose by murders, whippings, intimidations, and violence." H.R.Rep.No. 1, 42d Cong. 1st Sess. XXX-XXXI. The need to protect individuals being harassed because of their political associations rang throughout the Congressional debate. Senator George Edmunds of Vermont, who reported the bill out of committee, stated that:

> We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a

> neighborhood feud of one man or set of men against another to prevent one getting an indictment in the State courts against men for burning down his barn; but, *if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter,* (which is a pretty painful instance that I have in mind in the State of Florida within a few days where a man lost his life for that reason,) *then this section could reach it.*

42d Cong., 1st Sess. 567 (1871), reprinted in A. Avins, The Reconstruction Amendments Debates 547 (1967) (emphasis added). Representative Ellis Roberts repeated this same concern when discussing, in the House, the need for legislation.

> But one rule never fails: the victims whose property is destroyed, whose persons are mutilated, whose lives are sacrificed, are always Republicans. They may be black or white; they include those who wore the blue and those who wore the gray; new-comers and life-long residents, but only Republicans. *Stain the door lintels with the mark of opposition to reconstruction and of hostility to the national Administration, and the destroying angel passes by. Omit that sign, and the torch may kindle the roof that covers women and children; the scourge may fall upon shoulders that stoop with weakness and with age; the bullet may pierce the breast without warning. Such uniformity of result can come only from design. Republicans only are beaten and mutilated and murdered, because the blows are aimed at Republicans only.*

Cong. Globe, 42d Cong., 1st Sess., 412-413 (1871) (emphasis added).

Federal courts have recognized that those who are discriminated against because of political views or associa-

tions fall with the protective scope of Section 1985(2) and (3). Courts have found a class-based animus sufficient to support causes of action where the conspiracy is directed toward supporters of a particular political candidate, *Cameron* v. *Brock,* 473 F.2d 608 (6th Cir. 1973) and *Means* v. *Wilson,* 522 F.2d 833 (8th Cir. 1975), *cert. denied,* 424 U.S. 958, 96 S.Ct. 1436, 47 L.Ed.2d 364 (1976); voters who were deceived about the actual effect of their vote, *Smith* v. *Cherry,* 489 F.2d 1098 (7th Cir. 1973), *cert. denied* 417 U.S. 910, 94 S.Ct. 2607, 41 L.Ed.2d 214 (1974); individual critical of the President and his policies, *Glasson* v. *City of Louisville,* 518 F.2d 899 (6th Cir.), *cert. denied* 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 258 (1975); members of a group advocating an unpopular position, *Puentes* v. *Sullivan,* 425 F.Supp. 249 (W.D. Tex. 1977); laborers who are not members of a union, *Scott* v. *Moore,* 461 F. Supp. 224 (E.D. Tex. 1978); members of the teaching profession who talk or associate with the CIA, *Selzer* v. *Berkowitz,* 459 F.Supp. 347 (E.D.N.Y. 1978); and students who exercise their first amendment rights by joining certain organizations, *Brown* v. *Villanova University,* 378 F.Supp. 342 (E.D. Pa. 1974).

Unfortunately for plaintiffs in the case at bar, this second category is of little assistance. Plaintiffs have provided no summary judgment evidence to establish that they are victims of a conspiracy because of their political views or associations. Rather, even assuming a conspiracy exists, the record indicates that the conspiracy is directed at plaintiffs because they filed personal injury claims. This is simply not the type class that is protected by the statute.

In summary, plaintiffs have not established the class-based, discriminatory animus that is required for a cause of action under Section 1985(2), clause C. The district

court's grant of summary judgment on this portion of subsection (2) is affirmed.[11]

C. Clause D

[2] Clause D is aimed at conspiracies against individuals because the individuals lawfully enforce the right of any person or class of persons to equal protection. The courts that have construed this clause have universally noted that it is directed toward "equal protection of the laws," the key phrase in the Supreme Court's *Griffin* analysis. *See, e.g. Hahn* v. *Sargent,* 523 F.2d 461, 469 (1st Cir. 1975); *Brawer* v. *Horowitz,* 535 F.2d 830, 840 (3d Cir. 1976). The courts have required that plaintiffs establish a class-based invidiously discriminatory animus in order to prevail under this clause of Section 1985(2). As this Court noted above, plaintiffs have failed to establish that there was an appropriate class-based, discriminatory animus in the case at bar. Accordingly, the district court's grant of summary judgment for defendants on this clause is also affirmed.

D. Clause A

[3] Clause A is aimed at conspiracies to deter parties or witnesses from attending or testifying in any court of the United States. The district court granted summary judgment for defendants on this clause because plaintiffs failed to offer any evidence indicating that defendants attempted to deter a witness or party from attending or testifying in court. We agree.

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[11] Because plaintiffs have not established a class-based, invidiously discriminatory animus, this Court need not determine the applicability of the Section 1985(3) requirement of independent illegality set forth in this Court's opinion in *McLellan* v. *Mississippi Power & Light Co.*, 545 F.2d 919, 925-7 (5th Cir. 1977) (en banc), to Section 1985(2), clause C; or the constitutionality of a statute that creates a federal cause of action against private parties for obstructing justice in a state or territory. 445 F.Supp. at 275, n. 5.

Plaintiffs contend that defendants conspired not to hire anyone who had asserted a personal injury claim against a member of the oil industry. In essence, they assert that defendants' conspiracy is retaliatory in nature. However, plaintiffs have offered nothing to indicate that this retaliatory conspiracy has deterred anyone from attending or testifying in court. The district court's grant of summary judgment on this clause of Section 1985(2) is affirmed.

E. Clause [illegible]

[4] The second clause of Section 1985(2), clause B, creates a cause of action against individuals who conspire to injure a party or witness for having attended or testified in any court of the United States. The district court granted summary judgment for defendants on this clause because plaintiffs did not allege that they were injured because they *attended* or *testified* in court, but rather only that they were injured because they filed claims. The district court's conclusion is apparently premised on its belief that the phrase "attended or testified" requires actual physical presence in a courtroom. We reject such a narrow reading of the statute.

[5] Congress recognized that conspiracies designed to injure parties who turn to the courts can only produce a misapplication of the federal judicial system. Congress enacted the first part of Section 1985(2) in order to protect the sanctity of federal court proceedings and prevent miscarriages of justice. The justice provided by our judicial system, however, does not start on the day of trial. The process of obtaining justice in the court system begins long before a case is called to trial — it is initiated at the moment a party files a complaint. Congress undoubtedly intended to protect the whole course of justice, not just one segment of the system, the trial process. Thus, for the purposes of Section 1985(2) an individual is deemed to

have "attended" a court of the United States from the moment that the person files a complaint.

Congress certainly did not exceed constitutional bounds when it provided that an individual "attends" federal court when a complaint is filed. U.S.Const. art. III provides for a federal judiciary and U.S.Const. art. 1, § 8, cl. 18, provides that Congress shall have the power to make laws necessary and proper for executing all powers vested by the Constitution and the government of the United States. It is beyond question that Congress has the power to do what it did in the first part of Section 1985(2) — protect the federal judicial system from efforts to obstruct justice. *See McCulloch* v. *Maryland,* 17 U.S. 316, 4 Wheat. 316, 4 L.Ed. 579 (1819).

[6] Defendants contend that, even if the first part of Section 1985(2) is read expansively, plaintiff is still not entitled to relief for two reasons. Initially, defendants argue that the *Griffin* requirement of a class-based, invidiously discriminatory animus is also required by Section 1985(2), clause B. A careful reading of *Griffin* and the statute does not support defendants' argument.

The invidious animus requirement of *Griffin* is a test established for determining whether a conspiracy was designed to deprive "any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws," as required by Section 1985(3). Unlike Section 1985(3) and clauses C and D of Section 1985(2), clause B of Section 1985(2) is not limited to conspiracies aimed at deprivation of equal protection or equal privileges and immunities. There is no reference whatsoever in the first part of Section 1985(2) to the term equal protection. Although defendants urge that we read the *Griffin* limitation into the first part of Section 1985(2), neither the statute nor the legislative history will support

such an interpretation. The presence of the invidious animous requirement in Section 1985(3) and clauses C and D is persuasive evidence that Congress knew how to impose that limitation when it was intended. *See, Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir.), *cert. denied*, 434 U.S. 975, 98 S.Ct. 533, 54 L.Ed.2d 467 (1977) (holding *Griffin* inapplicable to Section 1958(1)). This Court declines to impose the invidious animus requirement where Congress clearly did not intend for it to be applied.

Defendant's second contention is that this Court's decision in *McLellan* v. *Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (en banc), should be applied in the case at bar. The issue in *McLellan* was whether an employee who was discharged from private employment because he filed a voluntary petition in bankruptcy stated a claim under Section 1985(3). This Court concluded that Section 1985(3) requires that the alleged acts of defendants must be illegal, independent of Section 1985(3).

> If the object of the defendant's conspiracy did not include a violation of some law (independent of Section 1985(3) itself) which protects the plaintiff, the conspiracy could not have deprived the plaintiff of the "protection of the laws." Put more simply, there can only be a deprivation of the rights of a plaintiff when the action of the defendants is *otherwise* illegal.

Id. at 925. Defendants in the case at bar contend that plaintiffs have failed to satisfy the independent illegality requirement of *McLellan*.

This Court need not decide whether these plaintiffs have satisfied the *McLellan* requirement of independent illegality, because that requirement is not applicable to the first part of Section 1985(2). The *McLellan* court developed the independent illegality requirement when it examined the language of Section 1985(3) dealing with "equal pro-

tection of the laws," and concluded that private persons can only deprive others of equal protection of the laws by violating a law already in existence. In the first part of Section 1985(2), as we noted above when discussing the applicability of *Griffin*, there is no mention of the term "equal protection of the laws." This Court must assume that Congress omitted the term "equal protection" from the first part of Section 1985(2) because it did not intend for the limitations associated with that phrase to be applicable to it. Defendants' argument that *McLellan* should be applied is rejected.

Thus, in order to survive defendants' motion for summary judgment, plaintiffs need only raise a factual question about whether defendants injured them on account of their having attended or testified in court. Plaintiffs have done this. Plaintiffs' summary judgment evidence establishes that defendants refused to hire them because they filed personal injury claims. If the trier of fact accepts plaintiffs' version, plaintiffs would be entitled to relief under Section 1985(2). The district courts grant of summary judgment on this clause was *partially* inappropriate. *See,* Part IV.

IV. THE APPROPRIATE CLASS

[7] Not all of the certified class of plaintiffs have a cause of action under clause B. Section 1985(2), clause B only provides a cause of action for individuals injured because they attended or testified in *any court of the United States.* The term "any court of the United States" does not mean any court physically located in the United States, but rather denotes courts that are part of the federal judicial system. *See Seeley* v. *Brotherhood of Painters, Decorators, and Paper Hangers of America,* 308 F.2d 52 (5th Cir. 1962); 28 U.S.C.A. § 451 (Supp.1980). State worker's compensation boards, state courts, and fed-

eral worker's compensation boards are not included in the term "any court of the United States." *Id.* Accordingly, the only plaintiffs that may avail themselves of Section 1985(2), clause B are those who allege they were victims of employment discrimination because they filed claims in federal court.

V. CONCLUSION

The district court's grant of summary judgment against those plaintiffs who were allegedly discriminated against because they asserted a personal injury claim before a state workers compensation board, in state court, or before a federal workers compensation board is affirmed. The district court's grant of summary judgment against plaintiffs who allege they were discriminated against because they filed a personal injury claim in federal court is reversed. These plaintiffs have a cause of action under Section 1985(2), clause B that survives summary judgment. The district court's grant of summary judgment against plaintiff Versie Kimble on his claim for damages is also reversed. Kimble also has a cause of action for damages under clause B that survives summary judgment.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

AINSWORTH, Circuit Judge, concurring in part and dissenting in part:

> I concur in the majority's holding that plaintiff's claims do not state a cause of action under clauses A, C, and D of Section 1985(2), 42 U.S.C. § 1985(2). I respectfully dissent, however, from the majority's decision that a cognizable claim is presented under clause B of Section 1985(2).

The wording of clause B forbids two or more persons from conspiring to "injure [a] party or witness in his

person or property on account of his having ... attended or testified" in a court of the United States. 42 U.S.C. § 1985(2). As the majority properly recognizes, plaintiffs did not allege any injury by virtue of having attended or testified in federal court. Instead, plaintiffs alleged that they were injured because they filed workmen's compensation claims in federal and state courts or before state and federal administrative tribunals. In the district court, Judge Rubin held that such allegations did not state a cause of action under clause B. Specifically he wrote that:

> The Conspiracy to Obstruct Justice Act does not create a claim for every conspiracy entered into with intent to deny a citizen access to a court, or to retaliate against a citizen for his utilization of the federal court system. If they are to come within the plain language of the statute, plaintiffs must allege that they were injured on account of having *attended* or *testified* in federal court. This they have not done. They allege that they suffered injury on account of having filed claims in federal court, or in state court, or with workmen's compensation boards created under federal or state law. Nowhere do they contend that defendants discriminated against them — "blacklisted" them — on account of their attendance or testimony in federal court. They reiterate, indeed, that such discrimination was casually related to the *filing* of claims. At most, the conspiracy charged was aimed at injuring the plaintiffs on account of their having asserted a claim or filed a lawsuit. Congress did not undertake to make that behavior actionable.
>
> [7] It can be argued with some cogency that the Congress ought to protect access to all federal courts, and make it tortious for anyone to retaliate against a person for using those courts. But Section 1985(2) does not, in its broadest possible reading, prohibit such conduct. Because the action is based on a statute, we need not consider the extent to which the Constitution may implicitly compel the government to provide unrestricted access to federal courts or the question whe-

ther the denial of any such right would create a cause of action for damages in tort. *See United States* v. *Kras*, 1973, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626, involving an unsuccesful challenge to the constitutionality of exacting a filing fee before bankruptcy proceedings could be commenced where the constitutional nexus (the Bankruptcy Clause) was held insufficient to ground an individual right.

There is little doubt that the Constitution grants authority to the Congress to enact legislation that would prohibit retaliation against a person for resorting to federal court. In the Conspiracy to Obstruct Justice Act it has undertaken to make actionable conduct aimed at deterrence of, or retaliation for, attendance or testimony in federal court; it might go further and forbid retaliatory conduct aimed at the filing of a federal lawsuit or assertion of a federal claim. Whether or not it has the power to make it a federal tort to retaliate against a person for resorting to state legal procedures is an issue that need not be faced here. There is no federal tort law. Nor does the plaintiff's suit rely upon general tort law. State law may — or may not — make tortious the kind of conduct alleged. Plaintiffs cause of action in this court, however, rests on Section 1985(2), and that statute does not extend to the action complained of.

Kimble v. *D. J. McDuffy, Inc.*, 445 F.Supp. 269, 276-77 (E.D.La.1978) (footnotes omitted).

The majority rejects Judge Rubin's reading of the "attended or testified" language of the statute finding it unnecessarily narrow. Instead, the majority interprets "attendance" to include the initial act of filing a lawsuit since "Congress undoubtedly intended to protect the whole course of justice, not just one segment of the system, the trial process." The majority adopts this expansive reading in light of the need "to protect the sanctity of federal court proceedings."

As Judge Rubin noted, the question presented in this case is not whether Congress possesses the *power* to enact legislation forbidding retaliatory conduct against a party for filing suit in federal courts. Rather, the issue is limited to determining whether the existing language of Section 1985(2) achieves that result. In my view, the language of the statute does not reach the allegations contained in the present suit. Accordingly, I would affirm Judge Rubin's opinion in its entirety.

Section 1985(2) has not generated much litigation. *See Brawer* v. *Horowitz*, 535 F.2d 830, 837 (3d Cir. 1976) (construing the "perfidious syntax of § 1985(2) with some reserve" given the "dearth of authority to light our way"). The majority of decisions arising under Section 1985 have involved Section 1985(3). In this regard, the Supreme Court's landmark opinion in *Griffin* v. *Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed2d 338 (1971) is instructive. In *Griffin*, the Court for the first time held that Section 1985(3) reached conspiracies by private parties to deny others the equal protection of the laws. Yet, the Court carefully delineated the cause of action cognizable under Section 1985(3). "The constitutional shoals that would lie in the path of interpreting Section 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose — by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. . . . [T]here must be some racial, or perhaps, otherwise class-based, animus behind the conspiratorial actions." *Griffin, supra*, 403 U.S. at 101-02, 91 S.Ct. 1798.

In accordance with *Griffin*, this court has limited cases brought under Section 1985(3) to those alleging racial or class-based animus. In *McLellan* v. *Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (*en banc*), we con-

sidered a claim by an employee that he was discharged for filing a petition in bankruptcy in contradiction of company rules. Relying on *Griffin,* the *en banc* court held that the plaintiff's allegations did not state a cause of action under Section 1985(3). We stated that:

> The Ku Klux Act[12] was passed amid the lawless conditions existing in the South after the Civil War. A major aim of the legislation 'was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.' It is readily apparent from the title of the bill itself, 'An Act to enforce the Provisions of the Fourteenth Amendment . . .,' that the key concern of the legislators was to put force behind the Civil War Amendments by providing an avenue for the redress of injuries suffered by the class of newly emancipated slaves. Nowhere have we seen it suggested that Congress was concerned about discrimination being practiced against insolvents.

McLellan, supra, 545 F.2d at 932 (footnotes omitted). Ironically, under today's majority opinion, the plaintiff in *McLellan* could have avoided dismissal of his lawsuit simply by adding an allegation asserting jurisdiction under Section 1985(2) since the alleged discrimination in that case arose from the filing of a federal bankruptcy action.

To be sure, both *Griffin* and *McLellan* involved cases arising under Section 1985(3) and not Section 1985(2). This fact, however, does not render the cases inapplicable to

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[12] The present language and structure of Section 1985(2) evolved from Section 2 of the Ku Klux Klan of 1871. *See B. Schwartz, Statutory History of the United States: Civil Rights (Part 1)* 591 (1970). Minor grammatical changes and restructuring were made in 1874.

the present dispute. Indeed, this court has held that *Griffin's* racial or class-based animus requirement is fully applicable to claims brought pursuant to the clauses C and D of Section 1985(2). *Slavin* v. *Curry*, 574 F.2d 1256, 1262, *modified*, 583 F.2d 779 (5th Cir. 1978). *See Dacey* v. *Dorsey*, 568 F.2d 275, 277)2d Cir. 1978); *Hahn* v. *Sargent*, 523 F.2d 461, 469 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 96 S.Ct. 1495, 47 L.Ed.2d 54 (1976). Furthermore, in *Jones* v. *United States*, 401 F.Supp. 168 (E.D.Ark. 1975), *aff'd* 536 F.2d 269 (8th Cir. 1976), *cert. denied*, 429 U.S. 1039, 97 S.Ct. 735, 50 L.Ed.2d 750 (1977), the district court held that *Griffin's* requirements also applied to actions brought under the first part of Section 1985(2). The court reasoned that since the Congressional history relied on by the Supreme Court in *Griffin* was generally applicable to all of Section 1985, the concern evidenced by the limitation to racial and class-based animus should apply in all cases brought under Section 1985(2) as well as in Section 1985(3). The Eighth Circuit affirmed the holding.

The majority rejects the view that actions brought under clause B require racial or class-based animus since that clause does not contain language paralleling Section 1985(3)'s proscription of a conspiracy denying others the equal protection of the laws. Since Congress failed to include the equal protection language in clause B of Section 1985(2), Congress must have intended to protect the entire process of litigation without any racial or class-based animus requirement. The majority's reasoning is unpersuasive. Even assuming that the difference in language between clause B of Section 1985(2) and Section 1985(3) compels a holding that clause B does not necessitate a racial or class-based animus requirement, the majority's ultimate conclusion that clause B protects persons who file lawsuits in federal courts does not follow. *Griffin* evidenced a general concern that actions brought under Section 1985 must

be carefully delineated in accordance with the statutory purposes of the Act. The specific limitations applied in *Griffin* for Section 1985(3) suits may not be applicable to clause B of Section 1985 (2), but *Griffin's* general concern for carefully defining the contours of Section 1985 litigation in order to avoid the creation of generalized federal tort law is fully applicable. In my view, Judge Rubin's construction of the language in clause B is precisely the carefully balanced interpretation required by *Griffin*.

The need to limit actions brought under the first part[13] of Section 1985(2) is aptly demonstrated by the Third Circuit's opinion in *Brawer*. In that case, the court considered a claim that the defendants conspired to use perjured testimony and to conceal exculpatory evidence in order to influence the verdict of the jury. Jurisdiction was alleged under the first part of Section 1985(2). After holding that racial or class-based animus was not required, the Third Circuit found that other limitations existed to define the cause of action under Section 1985(2). We understand the first part of § 1985(2) to concern itself with conspiratorial conduct that *directly* affects or seeks to affect parties, witnesses or grand or petit jurors. The allegations of this complaint are different in kind. At best, the allegation is that the conspiracy 'influenced' the jurors by precluding them from considering fully accurate evidence. We deem this 'influence' to be too remote to fit within the intended

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[13] While the majority and Judge Rubin separated Section 1985(2) into four subparts, other courts and commentators have considered Section 1985(2) as being divided into two parts separated by the semi-colon appearing in the middle of the Section. The first part, encompassing clauses A and B in the majority's structure, concern conspiracies against persons with respect to federal courts, whereas the second part, involving clauses C and D in the majority's analysis, concerns conspiracies in relation to state courts. *See generally* Comment, *Private Action Under 42 U.S.C. § 1985(b) for Conspiracies to Impede the Due Course of Justice*, 27 Kansas L.Rev. 621, 625 (1979).

ambit of § 1985(2)." *Brawer, supra,* 535 F.2d at 840. *See Brown* v. *Chaffee,* 612 F.2d 497 (10th Cir. 1979). When applied to the allegations in this case, *Brawer* supports Judge Rubin's interpretation of clause B.

It is axiomatic that our analysis of statutory law "must begin with the language of the statute itself." *Touche, Ross & Co.* v. *Redington,* 440 U.S. 560, 568, 99 S.Ct. 2479, 2485, 61 L.Ed.2d 82 (1979); *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462, 472, 97 S.Ct. 1292, 1300, 51 L.Ed.2d 480 (1977). The plain meaning of the word "attend" supports Judge Rubin's interpretation. Attend, simply put, means "to be present at." *Webster's Third International Dictionary* 140 (3d Ed. 1961).

Also, consideration of the legislative history supports the view that Congress intended the word "attend" to be given its ordinary meaning. Passage of the Ku Klux Klan Act was "motivated by a desire to prevent and punish acts of terror or intimidation that threatened the attempt to create a political environment hospitable to equality." Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose,* 46 U.Chi.L.Rev. 402, 405 (1979). In light of the actual acts of violence that threatened the sanctity of federal courts, Congress meant Section 1985(2) to protect a party based on his physical presence while attending or testifying in court. In this case, no allegations were made that plaintiffs were injured because they attended or testified in federal court. Given the background of violence and direct intimidation prevalent at the time of the original passage of Section 1985(2) the majority nevertheless and without any specific reference to Congressional history, finds that Congress intended to create a federal tort remedy for an employer's economic use of public information relating to the filing of federal lawsuits. Section 1985(2) was not designed as a vehicle to remedy such allegedly tortious

acts of employers against employees pursuing workmen's compensation claims. Rather, it was intended to protect against direct violations of a party's right to attend or testify in federal court. This clear Congressional purpose is best served by construing the statutory language in its ordinary meaning so that only direct interference with the federal courts is prohibited in accordance with the general concerns enunciated by *Griffin*. Accordingly, I dissent from the majority's construction of clause B of Section 1985(2).

APPENDIX D

***Versie Kimble, Plaintiff-Appellant* v. *D. J. McDuffy, Inc. and Industrial Foundation of the South, and all its subscribers, Defendants-Appellees*, No. 78-1474, United States Court of Appeals, Fifth Circuit, June 18, 1981, 648 F.2d 340.**

Lawrence D. Wiedemann, New Orleans, La., for plaintiff-appellant.

Phelps, Dunbar, Marks, Clavouie & Sims, Harry S. Redmon, Jr., Rutledge C. Clement, Jr., Margaret Ann Brown, New Orleans, La., George J. Petrovich, Jr., Fort Worth, Tex, for defendants-appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GODBOLD, Chief Judge, and BROWN, AINSWORTH, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, THOMAS A. CLARK and WILLIAMS, Circuit Judges.*

AINSWORTH, Circuit Judge:

The appellant, Versie Kimble, sued D. J. McDuffy, Inc., his former employer, along with several other employers in the oil drilling industry, and an association of such employers, in a class action alleging that they conspired to deny him and others employment because they had filed personal injury suits or workmen's compensation

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* Coleman, Circuit Judge, elected not to participate in the consideration or decision of this appeal.
Rubin, Circuit Judge, disqualified himself as he was the district judge in this case.

claims against employers in the industry. Kimble maintained that 42 U.S.C. § 1985(2)[1] a Reconstruction era statute intended to curtail the activities of the Ku Klux Klan, created a federal cause of action for anyone injured by another as a result of having filed lawsuits or claims for statutory benefits. The district court, with Circuit Judge Alvin B. Rubin sitting by designation, granted the defendants' motion for summary judgment, holding that the facts alleged, if proved, would not support an action under the statute. 445 F.Supp. 269 (E.D.La.1978). On appeal, a panel of this court, with one judge dissenting, reversed. 623 F.2d 1060 (1980). The court then voted to clear the case *en banc*, 629 F.2d 1159 (1980), thus vacating the panel opinion. *See* Fifth Circuit Local Rule 17. We now hold that Kimble's allegations do not come within the scope of Section 1985(2), and therefore affirm the district court.

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[1] 42 U.S.C. § 1985(2) provides:

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

....

... [T]he party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

I. THE FACTS

D. J. McDuffy, Inc., and the other employer-appellees, are members of appellee Industrial Foundation of the South (IFS), a nonprofit corporation organized to assist members in hiring personnel. According to its brochure, IFS maintains records of workmen's compensation claims and personal injury lawsuits filed in state courts in Texas, Louisiana, New Mexico and Oklahoma and in federal courts throughout the Gulf Coast region. The records include the worker's name and social security number, the name of the employer involved and its insurance carrier, a description of the injury or disability claimed, the names of any attorneys involved, and information about the disposition or settlement of the claim. The purpose of the organization is to reduce the employers' insurance and workman's compensation costs by giving the employers information about "insurance and compensation risks."

Kimble was employed by McDuffy as a driller from December 17, 1972 until April 7, 1973.[2] The company claims that it terminated Kimble because he was about to begin a campaign for a local political office.[3] Kimble claims that he was dismissed because McDuffy, which had just joined IFS on March 26, 1973, had learned through the foundation that

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[2] Kimble applied for a position with a different McDuffy drilling crew on April 8, 1973, and the crew supervisor apparently agreed to rehire him. Upon checking with the office, however the supervisor was told not to rehire Kimble. *See* Record on Appeal, Vol. 1 at 3; Deposition of Kimble at 24-27.

[3] Deposition of Kimble at 21-22. Kimble did, in fact, run unsuccessfully for political office in July 1973, having qualified to run by filing a 50-signature petition in late April or early May. Deposition of Kimble at 29-31.

Kimble had filed a lawsuit against a prior employer and had obtained a sizable judgment.[4] For the purposes of the defendants' motion for summary judgment, we must assume that Kimble's factual allegations are correct. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970); *Tyler* v. *Vickery*, 517 F.2d 1089, 1094 (5th Cir. 1975).

In its opinion granting the defendants' motion for summary judgment, the district court divided 42 U.S.C. § 1985(2) into four clauses:

> A. If two or more persons conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein . . . or
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> B. to injure such party or witness in his person or property on account of his having so attended or testified, or
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> C. if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny any citizen the equal protection of the laws, or
>
> D. to injure him or his property for lawfully enforcing . . . the right of any person, or class of persons, to the equal protection of the laws.

445 F.Supp. at 274. The district court held that in order to maintain a cause of action under clauses C and D, a plaintiff must demonstrate that the defendants acted with racial

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[4] In 1969, Kimble sustained an injury to his right shoulder while he was employed by Noble Drilling Company. He obtained a jury verdict of $35,000. Some time thereafter, he broke a finger while employed by Reading & Bates. He also filed a lawsuit over that injury and received a settlement of $6,500. Record on Appeal, Vol. 1 at 136.

or class-based animus, and that no allegation of such animus was made in this case. 445 F.Supp. at 274-75. The court then held that clause A required a conspiracy to deter a party or witness from attending or testifying in federal court. 445 F.Supp. at 275. Again, no allegation of any attempt to deter or intimidate was made by plantiffs. Finally, the district court held that the filing of lawsuits or workmen's compensation claims did not constitute attending or testifying in federal court as required by clause B. 445 F.Supp. at 276.

[1] The panel majority, in reversing the district court, agreed that Kimble had stated no valid cause of action under clauses A, C and D of Section 1985(2), but rejected the district court's "narrow reading" of clause B. The panel held that "Congress undoubtedly intended to protect the whole course of justice, not just one segment of the system, the trial process. Thus, for the purposes of Section 1985(2) an individual is deemed to have 'attended' a court of the United States from the moment that the person files a complaint." 623 F.2d at 1068. The district court and a panel of this court thus agreed that Kimble stated no cause of action under clauses A, C, and D of Section 1985(2). We fully concur with and adopt their holding as to those clauses, and therefore turn our attention solely to clause B.

II. THE DERIVATION OF 42 U.S.C. § 1985(2)

[2, 3] The present wording of Section 1985(2) dates back to the 1874 consolidation of the then widely scattered federal laws into the Revised Statutes of the United States. Section 1980 of the Revised Statutes consolidated two acts, the Conspiracy Act of 1861, 12 Stat. 284, and the Ku Klux Klan Act of 1871, 17 Stat. 13. This section, R.S. § 1980, survives intact to this day as 42 U.S.C. § 1985. R.S. § 1980(2) is now, without change, 42 U.S.C. § 1985(2). In

discussing the legislative history of Section 1985(2), the district court apparently believed that the section is derived from the Conspiracy Act, rather than the Ku Klux Klan Act which spawned Section 1985(3). 445 F.Supp. at 271. The court discussed whether decisions interpreting the intent of Congress in passing the Ku Klux Klan Act apply to Section 1985(2). This notion of the derivation of Section 1985(2) is mistaken, however. An examination of the original acts reveals that much of the language of Section 1985(2) comes from the Ku Klux Klan Act and not the Conspiracy Act. In particular, the portion of Section 1985(2) which the district court designated clause B, relating to injuring any party or witness on account of his having attended or testified in federal court, is derived from the Ku Klux Klan Act and not the Conspiracy Act.[5] We

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[5] Section 2 of the Ku Klux Klan Act, 17 Stat. 13 (1871) provided:

Sec. 2. That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force the authority of the government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, or by force, intimidation, or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States, or from discharging the duties thereof, or by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or to injure his person while engaged in the lawful discharge of the duties of his office, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duty, or by force, intimidation, or threat to deter any party or witness in any court of the United States from attending such court, or from testifying in any matter pending in such court fully, freely, and truthfully, *or to injure any such party or witness in his person or property on account of has having so attended or testified*, or by force, intimidation, or threat to influence the verdict, presentment, or indictment, of any juror or grand juror in any court of the

therefore look directly to the decisions examining the intent of Congress in passing the Ku Klux Klan Act in our effort

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United States, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or on account of his being or having been such juror, or shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or shall conspire together for the purpose of in any manner impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, or by force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful manner towards or in favor of the election of any lawfully qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy, each and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States or district or supreme court of any Territory of the United States having jurisdiction of similar offences, shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine. And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy, such action to be prosecuted in the proper district

to interpret clause B, and need not be concerned with whether the same intent supported the Conspiracy Act.[6]

III. THE REQUIREMENT OF RACIAL OR CLASS-BASED ANIMUS

Section 1985(2) has not generated much litigation. *See Brawer* v. *Horowitz*, 535 F.2d 830, 837 (3d Cir. 1976) (construing the "perfidious syntax of §1985(2) with reserve" given the "dearth of authority to light our way"). The majority of decisions arising under Section 1985 have involved Section 1985(3). In this regard, the Supreme Court's landmark opinion in *Griffin* v. *Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971) is instructive. In *Griffin*, the court for the first time held that Section 1985(3) reached conspiracies by private parties to deny others the equal protection of the laws. Yet, the Court carefully delineated the cause of action cognizable under Section 1985(3). "The constitutional shoals that would lie in the path of interpreting Section 1985(3) as a general federal tort law can be avoided by giving full effect to the

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or circuit court of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like case in such courts under the provisions of the act of April ninth, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication."

(Emphasis added.) The emphasized portion is the source of clause B of Section 1985(2).

[6] In passing the 1874 act to consolidate and collect all federal statutes and laws, Congress did not intend to change the meaning of the laws even though it made minor changes in language to accommodate the consolidation. "In transferring the language [to the Revised Statutes], it is to be presumed that it was intended to transfer the sense." *Pott v. Arthur*, 104 U.S. 735, 736, 26 L.Ed. 909 (1881). The Revised Statutes were republished, with minor corrections and some additions, in 1878. At that time, Congress made it clear that discrepancies between the original acts and the Revised Statutes were to be resolved by consulting the original acts. 20 Stat. 27 (1878).

congressional purpose — by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment .... [T]here must be some racial, or perhaps, otherwise class-based animus behind the conspiratorial actions." *Griffin, supra,* 403 U.S. at 101-102, 91 S.Ct. at 1798.

In accordance with *Griffin,* this court has limited cases brought under Section 1985(3) to those alleging racial or class-based animus. In *McLellan* v. *Mississippi Power & Light Co.,* 545 F.2d 919 (5th Cir. 1977) (*en banc*), we considered a claim by an employee that he was discharged for filing a petition in bankruptcy in contradiction of company rules. Relying on *Griffin,* the *en banc* court held that the plaintiff's allegations did not state a cause of action under Section 1985(3). We stated that

> The Ku Klux Act was passed amid the lawless conditions existing in the South after the Civil War. A major aim of the legislation 'was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.' It is really apparent from the title of the bill itself, 'An Act to enforce the Provisions of the Fourteenth Amendment...,' that the key concern of the legislators was to put force behind the Civil War Amendments by providing an avenue for the redress of injuries suffered by the class of newly emancipated slaves. Nowhere have we seen it suggested that Congress was concerned about discrimination being practiced against insolvents.

McLellan, supra, 545 F.2d at 932 (footnotes omitted). Ironically, under the panel majority's opinion, the plaintiff in *McLellan* could have avoided dismissal of his lawsuit simply by adding an allegation asserting jurisdiction under

Section 1985(2) since the alleged discrimination in that case arose from the filing of a federal bankruptcy action.

To be sure, both *Griffin* and *McLellan* involved cases arising under Section 1985(3) and not Section 1985(2). This fact, however, does not render the cases inapplicable to the present dispute. Indeed, this court has held that *Griffin's* racial or class-based animus requirement is fully applicable to claims brought pursuant to the clauses C and D of Section 1985(2). *Slavin* v. *Curry*, 574 F.2d 1256, 1262, *modified*, 583 F.2d 779 (5th Cir. 1978). *See Dacey* v. *Dorsey*, 568 F.2d 275, 277 (2d Cir. 1978); *Hahn* v. *Sargent*, 523 F.2d 461, 469 (1st Cir. 1975), *cert. denied*, 425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed.2d 54 (1976). Furthermore, in *Jones* v. *United States*, 401 F.Supp. 168 (E.D.Ark. 1975), *aff'd* 536 F.2d 269 (8th Cir. 1976), *cert. denied*, 429 U.S. 1039, 97 S.Ct. 735, 50 L.Ed.2d 750 (1977), the district court held that *Griffin's* requirements also applied to actions brought under the first part of Section 1985(2). The court reasoned that since the congressional history relied on by the Supreme Court in *Griffin* was generally applicable to all of Section 1985, the concern evidenced by the limitation to racial and class-based animus should apply in all cases brought under Section 1985(2) as well as in Section 1985(3). The Eighth Circuit affirmed the holding. 536 F.2d 269 (8th Cir. 1979).

[4-7] The panel rejected the view that actions brought under clause B require racial or class-based animus since that clause does not contain language paralleling Section 1985(3)'s proscription of a conspiracy denying others the equal protection of the laws. It held that since Congress failed to include the equal protection language in clause B of Section 1985(2), it must have intended to protect the entire process of litigation without any racial or class-based animus requirement. The panel majority's reasoning is unpersuasive. *Griffin* evidenced a general concern

that actions brought under Section 1985 must be carefully delineated in accordance with the statutory purposes of the Act in order to avoid the unintended creation of a general federal tort law. Section 1985(2) and Section 1985(3) are both derived from Section 2 of the Ku Klux Klan Act.[7] Both modern sections are liberally laced with references to "the equal protection of the law," but neither includes a reference to equal protection in each and every clause of the section. The Supreme Court did not arrive at its conclusion that Section 1985(3) required racial or class-based animus through a hypertechnical analysis of the structure and grammar of the section. Instead, the Court examined the overall purpose of Congress in passing the Ku Klux Klan Act, reached the obvious conclusion that Congress did not intend to create a general federal tort law, and held that Congress intended the act to apply only in cases where there was racial or class-based animus. The *Griffin* analysis is not applicable to only a small part of Section 2 of the Ku Klux Klan Act, but to the act in its

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[7] 42 U.S.C. § 1985(3) provides:

> (3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of

entirety.[8] If racial or class-based animus is required by Section 1985(3), it is required by Section 1985(2) as well.[9]

[8] As the district court and the panel majority agreed, no showing of racial or class-based animus can be made in this case. Clearly, race is not involved. Moreover, the

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having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

A careful reading of Section 2 of the Ku Klux Klan Act, set out in note 5, *supra*, indicates that portions of that section are the source of Section 1985(3) as well as Section 1985(2).

[8] The formal title of the Ku Klux Klan Act itself indicates that the act was not a general federal tort law but instead an act designed to prevent retaliation against those who seek to enforce their rights under the Civil War amendments: "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for Other Purposes." 17 Stat. 13 (1871).

[9] Congressional action in enacting 18 U.S.C. § 1503, which imposes criminal penalties for obstruction of justice, may be seen as evidence of Congress's belief that 42 U.S.C. § 1985(2) applies only to conspiracies motivated by racial or class-based animus.
The dissent states that we now require the application of an equal protection test in Section 1985(2) actions, and asserts that "[i]t makes little sense . . . to apply an equal protection test to cases that are founded on the denial of other constitutional rights – such as the political rights protected by section 1985(3) or the due process rights protected by the first part of section 1985(2)." The class-based animus required by the Supreme Court in *Griffin* and now reasserted by this court is not identical with the class-based distinctions required to support an action under the equal protection clause, however. For example, section 1985 was certainly intended to cover conspiracies against Republicans; distinctions based on affiliation with a major political party are not among those traditionally subject to special scrutiny under the Fourteenth Amendment. What *Griffin* stands for, and what we now hold, is that Section 1985 was intended to encompass only those conspiracies motivated by animus against the kinds of classes Congress was trying to protect when it enacted the Ku Klux Klan Act. Certainly "conspiracies" against workers who file personal injury or workmen's compensation claims are not among those Congress was trying to deter in 1871.

"class" of persons who have filed personal injury lawsuits or workmen's compensation claims is neither a class based on political beliefs or associations (the kind of class envisioned by the framers of the Ku Klux Klan Act) nor a class "having common characteristics of an inherent nature," 445 F.Supp. at 273 (the kind of class afforded special protection under the equal protection clause). The district court and the panel majority acknowledged that the logic of *Griffin* would be lost if the "class" of people allegedly victimized by the defendants' allegedly tortious conduct was considered to be a sufficient class under Section 1985 merely by virtue of their common complaint. *See also Lopez* v. *Arrowhead Ranches*, 523 F.2d 924, 928 (9th Cir. 1975).

IV. THE REQUIREMENT OF ATTENDING OR TESTIFYING IN COURT

Clause B of 42 U.S.C. § 1985(2) forbids two or more persons from conspiring to "injure [a] party or witness in his person or property on account of his having . . . attended or testified" in a court of the United States. Plaintiffs did not allege any injury by virtue of having attended or testified in federal court. Instead, plaintiffs alleged that they were injured because they filed personal injury suits or workmen's compensation claims in federal and state courts or before state and federal administrative tribunals. The district court held that such allegations did not state a cause of action under clause B:

> [Section 1985(2)] does not create a claim for every conspiracy entered into with intent to deny a citizen access to a court, or to retaliate against a citizen for his utilization of the federal court system. If they are to come within the plain language of the statute, plaintiffs must allege that they were injured on account of having *attended* or *testified in* federal court. This they have not done . . . At most, the conspiracy

> charged was aimed at injuring the plaintiffs on account of their having asserted a claim or filed a lawsuit. Congress did not undertake to make that behavior actionable.

445 F.Supp. at 276 (emphasis in original; footnotes omitted). The panel majority rejected the district court's interpretation, finding it overly narrow and holding that "Congress undoubtedly intended to protect the whole course of justice, not just one segment of the system, the trial process." 623 F.2d at 1068.

[9-11] The question presented in this case is not whether Congress possesses the *power* to enact legislation forbidding retaliatory conduct against a party for filing suit in federal courts. Rather, the issue is limited to determining whether the existing language of Section 1985(2) achieves that result. It is axiomatic that our analysis of statutory law "must begin with the language of the statute itself." *Touche, Ross & Co.* v. *Redington,* 442 U.S. 560, 568, 99 S.Ct. 2479, 2485, 61 L.Ed.2d 82 (1979); *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462, 472, 97 S.Ct. 1292, 1300, 51 L.Ed.2d 480 (1977). The plain meaning of the word "attend" supports the district court's interpretation. Attend, simply put, means "to be present at." *Webster's Third International Dictionary* 140 (3d ed. 1961).

Also, consideration of the legislative history supports the view that Congress intended the word "attend" to be given its ordinary meaning. Passage of the Ku Klux Klan Act was "motivated by a desire to prevent and punish acts of terror or intimidation that threatened the attempt to create a political environment hospitable to equality." Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose,* 46 U.Chi.L.Rev. 402, 405 (1979). In light of the acts of violence that threatened the sanctity of federal courts, Congress meant Section 1985(2) to protect

a party based on his physical presence while attending or testifying in court. In this case no allegations were made that plaintiffs were injured because they attended or testified in federal court. Given the background of violence and direct intimidation prevalent at the time of the original passage of Section 1985(2), it would be anomalous to find, without any specific support in the legislative history, that Congress intended to create a federal tort remedy for an employer's economic use of public information relating to the filing of federal lawsuits. Section 1985(2) was not designed as a vehicle to remedy such allegedly tortious acts of employers against employees pursuing workmen's compensation or personal injury claims. Rather, it was intended to protect against direct violations of a party or witness's right to attend or testify in federal court. This clear congressional purpose is best served by construing the statutory language in its ordinary meaning so that only direct interference with the federal courts is prohibited in accordance with the general concerns enunciated by *Griffin*.

V. CONCLUSION

The plaintiff's allegations do not indicate that the defendants acted with the racial or class-based animus required by 42 U.S.C. §1985(2). In addition, the allegations do not state that the plaintiff was injured on account of having attended or testified in a court of the United States in violation of section 1985(2). We therefore affirm the district court's grant of summary judgment.

AFFIRMED.

REAVLEY, Circuit Judge, with whom GODBOLD, Chief Judge, and RANDALL, Circuit Judge, join, specifically concurring:

I concur in the judgment for the reasons given in part IV of the majority opinion. I agree with the dissent that no racial or class-based animus is required by Section 1985(2).

THOMAS A. CLARK, Circuit Judge, concurring specially:

I concur in the en banc decision to affirm the judgment of the district court. It is not necessary to hold, as the majority opinion does, that racial or class-based animus is necessary in order to invoke 42 U.S.C. §1985(2). This case can be decided under its facts without such an interpretation. Subsection 2 of the Act does not include an equal protection clause as pointed out in the majority opinion, and for this reason one can validly contend that the Supreme Court decision in *Griffin* v. *Breckinridge,* 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971), is inapplicable. That case interpreted subsection 3 which does include an equal protection clause.

In the present case the plaintiffs were not refused employment because they attended or testified in federal court. The reason for the non-hire was that plaintiffs had pursued claims against oil companies for injuries related to their employment. The refusal to hire applied whether the claim was in federal court, state court, or a workmen's compensation administrative proceeding. Since there was no nexus between the use of the federal courts and the reason for the refusal to hire, plaintiffs' allegations could not come within 42 U.S.C. §1985(2). We have unnecessarily given broad scope to an Act that has no relationship to plaintiffs' failure to be employed. Thus, while I agree with the en banc court decision, I do not join in the opinion.

SAM D. JOHNSON, Circuit Judge, with whom VANCE, KRAVITCH, POLITZ, HATCHETT, ANDERSON and TATE, Circuit Judges, join, dissenting in part and concurring in part:

This writer respectfully dissents from that portion of the panel decision that the en banc Court disturbs. This concurrence extends only to that part of the panel opinion that the en banc Court leaves intact.

FACTS

Plaintiff Versie Kimble and the class he represents are oil industry workers who resorted to state and federal courts or workmen's compensation boards for redress of physical injuries. This, of course, was their legal right. For a fee, the Industrial Foundation of the South furnishes oil industry employers with a laborer's record of claims filed against companies in the oil industry for employment injuries.

The plaintiff here, Versie Kimble, sustained an injury in 1969 while working for a drilling company, filed suit for damages in the federal district court, and obtained a $25,000 jury verdict. In 1972, Kimble began working for the defendant McDuffy. Some months later, McDuffy fired Kimble upon learning of Kimble's prior suit. Kimble sought work from other companies here named as co-defendants, but was unable to obtain employment. It was not until later that Kimble learned that the Industrial Foundation of the South was collecting information concerning personal injury claims and disseminating it.

With the information supplied by the Industrial Foundation, the oil industry employers allegedly discharged current employees or refused to hire prospective employees. Of course, blacklisting has a direct and substantial impact on these working men and women — the very real hardship of being thrown out of work or being unable to find employment for doing nothing more than pursuing their rightful remedies.

Plaintiffs turned to 42 U.S.C.A. §1985(2), to fight this blacklisting by employers. Accepting plaintiffs' alleged

facts as true, the district judge granted summary judgment for defendants. 445 F. Supp. 269 (E.D.La. 1978). A panel of the Fifth Circuit affirmed the district court on all but one of the grounds. 623 F.2d 1060 (5th Cir. 1980). The panel majority held that section 1985(2), clause B, contained a remedy for the blacklisting of federal court plaintiffs. It is this partial reversal that the en banc Court has addressed.

THE INAPPLICABILITY OF GRIFFIN

In *Griffin* v. *Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971), the Supreme Court held that there must be some racial or otherwise class-based invidiously discriminatory motivation for a private conspiracy to be actionable under the equal protection language of section 1985(3). The panel majority held that this equal protection test applied only to equal protection cases — suits invoking the equal protection clause of section 1985(3), as in *Griffin*, or invoking section 1985(2), clauses C or D, which also contain equal protection language. Clauses A and B of section 1985(2), on the other hand, contain no equal protection language. The panel dissent conceded the inapplicability of *Griffin's* invidiously discriminatory animus requirement to this case and relied on *Griffin* only as authority to narrowly interpret section 1985(2). 623 F.2d at 1072. However, the en banc majority here holds that there must also be an invidiously discriminatory animus for private conspiracies to be actionable under clause B of section 1985(2). A brief review of the source, structure, and purpose of section 1985(2) demonstrates the error of this holding.

Section 1985(2) is derived from section 2 of the Ku Klux Klan Act of 1871. The Klan Act was induced by massive and frequently violent resistance in the Southern states to federal reconstruction and the inability or unwillingness

of state governments to deal effectively with the violence. *Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329, 1334 (7th Cir.), *cert. denied*, 434 U.S. 975, 98 S.Ct. 533, 54 L.Ed. 2d 467 (1977). Racial equality and protection of civil rights were not the only reasons for enactment of the Klan Act, however. A major concern was restoration of civil authority and preservation of orderly government, including federal court ability to proceed without improper interference. *McCord* v. *Bailey*, 636 F.2d 606, 615 (D.C. Cir.1980), *cert. filed*, 49 U.S.L.W. 3532 (Jan. 13, 1981).

Accordingly, the first part of section 1985(2), clauses A and B, prohibits conspiracies to interfere with the integrity of the *federal* judicial system. Clause A is in pertinent part concerned with efforts to deter *future* attendance or testimony in federal court, while Clause B is in pertinent part aimed at retaliations for *past* federal court attendance or testimony. The second part, clauses C and D, concerns conspiracies in relation to *state* courts. Clause C deals with efforts to obstruct the *future* course of justice in state courts with the intent to deny equal protections of the laws. Clause D is aimed at retaliations for *past* efforts to enforce the right to equal protection of the laws.

The absence of equal protection language in the first part of section 1985(2),[10] and the presence of equal protection

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[10] It is important to note that the division of section 1985(2) into four independent clauses does not artificially separate the first part from the equal protection language found only in the second part. Section 2 of the Ku Klux Klan Act, which is reprinted in note 5 of the majority opinion, reveals this. The respective clauses from which clauses A and B of section 1985(2) are derived contain no equal protection language, and the respective clauses in section 2 from which clauses C and D of section 1985(2) are derived *each* requires an equal protection denial purpose or intent for the conspiracy. Section 1985(3) in pertinent part prohibits private conspiracies to deprive others of equal protection of the laws. The clause in section 2 of the Klan Act of 1871 from which the equal protection clause of section 1985(3) is derived also

language in section 1985(3) and in the second part of section 1985(2), indicates that Congress knew how to impose the equal protection limitation when it was so intended. *See Stern*, 547 F.2d at 1340. From this it must be concluded that Congress intentionally limited conspiracies in relation to state courts to those conspiracies aimed at depriving persons of equal protection of the laws, but did not so intend with regard to conspiracies to interfere with federal courts. *See McCord*, 636 F.2d at 615. Why is the first part of section 1985(2) so different from section 1985(3) and the second part of section 1985(2)?

Concerns about the constitutional scope of congressional power under the thirteenth and fourteenth amendments moved Congress to limit federal Klan Act jurisdiction over state torts or crimes. Congress eliminated the original provisions authorizing general federal enforcement of common law crimes and inserted the requirement of a conspiratorial motivation to deny equal protection of the laws. Federal jurisdiction thus encompassed those state law violations, such as obstruction of justice in state courts, that also injured the fourteenth amendment interest in promoting racial equality and protecting civil rights. Otherwise, a conspiracy to commit simple assault and battery might become actionable under federal question jurisdiction. No such limitations are required, however, for protection of the federal interest in the integrity of the federal judicial system and the due process right of participation in the federal court system. *See McCord*, 636 F.2d at 615-17.

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requires an equal protection denial purpose for that conspiracy. *See also Brawer* v. *Horowitz*, 535 F.2d 830, 837-39 (3d Cir. 1976), which notes that there was no substantive change in the statutory schema between the 1871 Act and the 1874 consolidation of federal laws into the Revised Statutes. Certainly, the equal protection limitation is a substantive one.

The en banc majority ignores this distinction between state and federal jurisdiction. The en banc majority states that the Supreme Court in *Griffin* did not arrive at its conclusion that section 1985(3) required a racial or class-based discriminatory animus through a "hypertechnical analysis of the structure and grammar of the section." Instead, the en banc majority explains, the Supreme Court reached the conclusion that Congress did not intend to create a general federal tort law by examining the overall purpose of Congress in passing the Klan Act. Consequently, the en banc majority asserts, the Supreme Court concluded that Congress intended *the Act* to apply only in cases where there was a racial or class-based animus. On this reasoning, the en banc majority applies the *Griffin* holding to the Act in its entirety; if required by section 1985(3), a racial or class-based animus is in the en banc majority's view required by section 1985(2) as well.

This reasoning misconstrues *Griffin*. In *Griffin* the plaintiffs invoked section 1985(3)'s equal protection clause. To avoid the unintended creation of a general federal tort law, the Court held that as an element of a cause of action, there must be a racial, or other class-based, invidiously discriminatory conspiratorial animus. 403 U.S. at 102, 91 S.Ct. at 1798. The Supreme Court expressly relied on the equal protection language in section 1985(3) when it pronounced its holding: "The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* (emphasis in original).

Indeed, the Court was construing only the portion of section 1985(3) that prohibits conspiracies to deprive persons of equal protection of the laws. Section 1985(3) also prohibits conspiracies to prevent any voter from

giving his support to or advocacy for any candidate for a federal political office. Consistent with the maxim that the conspiratorial motivation must be delineated in accordance with the purposes of the civil rights conspiracy statute, a suit predicated on section 1985(3)'s political rights clause requires a conspiratorial animus to deny others their federal political rights. *See generally Paynes* v. *Lee*, 377 F.2d 61, 63-64 (5th Cir. 1967). Therefore, a suit predicated on clause B of section 1985(2) requires a conspiratorial motivation to retaliate for the exercise of the due process right to utilize and participate in the federal court system.[11]

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[11] In support of the holding that the *Griffin* discriminatory animus requirement applies to all of the Klan Act, the en banc majority cites the formal title of the Ku Klux Klan Act itself: "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for Other Purposes." Without delving into the prudency of reliance on titles to statutes, it is sufficient to note that "Other Purposes" is broad enough to encompass the congressional purpose of protecting the sanctity of the federal judicial process. *See generally McCord*, 636 F.2d at 617; *Stern*, 547 F.2d at 1341 n.18; *Paynes*, 377 F.2d at 63-64.

The majority points out that the class-based animus requirement is not the same as the test for whether a class-based distinction is actionable under the equal protection clause of the fourteenth amendment. This observation is of course correct since the Supreme Court in *Griffin* referred to a "*racial*, or perhaps other *invidiously* discriminatory animus." 403 U.S. at 102, 91 S.Ct. at 1798 (emphasis added). The fourteenth amendment's equal protection clause reaches much more than invidious discrimination. Therefore, the scope of actionable discrimination under the equal protection clauses of § 1985(2) and (3) is much narrower than that under the fourteenth amendment's equal protection clause.

The majority, however, concludes that the narrower test for the equal protection clauses of § 1985(2) and (3) is not simply invidious discrimination. Instead, the majority states that all of § 1985 was intended to include only those conspiracies motivated by an animus against the kinds of classes Congress was trying to protect with the enactment of the Klan Act. The majority gives as its example conspiracies against Republicans, noting that distinctions based on affiliation with a major political party are not among those traditionally subject to special scrutiny under the

Griffin was expressly an interpretation of section 1985(3)'s equal protection clause and no more.

As judicial support for applying an equal protection test to the first part of section 1985(2), the en banc majority cites Fifth Circuit cases requiring a racial or class-based animus for suits brought under the second part of section 1985(2). Because the second part expressly contains an equal protection animus requirement, there is nothing surprising about these holdings. Such holdings, of course, say nothing about what is required for the first part of section 1985(2). The only case cited by the en banc majority as direct support for its theory is *Jones* v. *United States*, 401 F.Supp. 168, 172-4 (E.D.Ark. 1975), *aff'd*, 536 F.2d 269, 271 (8th Cir. 1976), *cert. denied*, 429 U.S. 1039, 97 S.Ct. 735, 50 L.Ed.2d 750 (1977). The district court there reasoned, as does the en banc majority here, that the *Griffin* racial or class-based animus requirement applies to the first part of section 1985(2) because the equal protection limitation was allegedly intended to limit the entire Ku Klux Klan Act. The cases cited by the district court in support of its position, however were all presented with a claim cognizable

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fourteenth amendment. Discrimination on the basis of political association, however, is in fact within strict scrutiny as constitionally suspect under the first and fourteenth amendment and under the equal protection clause of the fourteenth amendment unless essential to serve a compelling state interest. *See Riddell* v. *National Democratic Party*, 508 F.2d 770, 775 (5th Cir. 1975). Discrimination against Republicans would also be actionable under the political rights clause of § 1985(3). Conspiracies against workers who file personal injury or workman's compensation claims are probably not actionable under the equal protection clauses of § 1985(2) and (3). *See Scott* v. *Moore*, 640 F.2d 708, 718-24 (5th Cir. 1981). That issue is not present in this case, however, if the class-based discriminatory animus requirement does not apply to the first half of § 1985(2). Again, whatever may have been the congressional intent with respect to the equal protection clauses, it is inappropriate to carry that intent over to other areas of the statute that neither contain nor need the limitation of an equal protection test.

only under the second part of section 1985(2). Although the Eighth Circuit affirmed the district court, it addressed this question with only three brief sentences. Such a summary affirmance is not compelling persuasive reasoning by a sister circuit.

In fact, the case authority is contrary to the en banc majority's position here. In a pre-*Griffin* case, this Circuit held that employment retaliation against a labor union member for having appeared and testified before the National Labor Relations Board and a state court could have been within section 1985(2), clause B, except that neither the NLRB nor the state court was a "court of the United States" within the meaning of the statute. *Seeley* v. *Brotherhood of Painters, Decorators & Paper Hangers of America*, 308 F.2d 52, 58 (5th Cir. 1962). Cases decided after *Griffin* have also rejected the theory that a racial or class-based animus requirement applies to the first part of section 1985(2).

For example, in *Brawer* v. *Horowitz*, 535 F.2d 830, 840 (3d Cir. 1976), the Third Circuit expressly held that only the second part of section 1985(2), and not the first part, requires a class-based, invidiously discriminatory animus. The federal nexus that the first part of section 1985(2) requires is only a connection between the proscribed activities and a federal court. *Id.* More recently, *McCord* v. *Bailey*, 636 F.2d 606, 614-17 (D.C. Cir. 1980), *cert. filed*, 49 U.S.L.W. 3532 (Jan. 13, 1981), also held that the *Griffin* invidiously discriminatory animus requirement was inapplicable to the first part of section 1985(2) since that part did not contain equal protection language. *McCord* also expressly rejected the notion that such a requirement was necessarily implied in the first part of section 1985(2), to avoid the constitutional shoals of creating a general federal tort law, because there could be no problem of limitations

on Congress' power with regard to protection of the federal interest in its judicial process.[12]

The en banc majority opinion reflects a concern that recognition of a cause of action under clause B of section 1985(2) in this case would create a general federal tort remedy, for an employer's economic use of public information relating to the filing of federal lawsuits, in contravention of the constitutional concerns enunciated by *Griffin*. To avoid the constitutional shoals of federalizing state tort law, the en banc majorty would limit all section 1985 actions by requiring a racial or class-bound conspiratorial animus. It makes little sense, however, to apply an equal proctection test to cases that are founded on the denial of other constitutional rights — such as the political rights protected by section 1985(3) or the due process rights protected by the first part of section 1985(2). The constitutional shoals of a general federal tort law are more properly avoided by delineating the conspiratorial animus for a conspiracy under clause B of section 1985(2) to the statutory purpose of protecting the integrity of the federal court system. This can be accomplished by simply requiring a conspiratorial animus to injuriously retaliate against a party or witness for having attended or testified in federal court. Recognizing a cause of action for such a conspiracy carries with it no potential for federalizing state tort law since the due

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[12] *Id* at 617. *See also Stern*, 547 F.2d at 1341 n.18, which noted that the first part of § 1985(2) is aimed at protecting the sanctity of federal court proceedings and could be sustained without reference to or nexus with the thirteenth and fourteenth amendments.

Stern held that the *Griffin* invidously discriminatory animus requirement is inapplicable to § 1985(1) because of its lack of any equal protection language. In dicta, *Stern* noted that while the *Griffin* discriminatory animus requirement would apply to the second part of § 1985(2) because of the equal protection language present there, the very absence of that language in the first part of § 1985(2) precludes application of the *Griffin* requirement to that portion.

process high to utilize and participate in the federal court system is solely a federal right.

In short, the en banc majority's position violates the language of the statute as well as the holding of *Griffin*. I therefore dissent from the en banc majority's holding that clause B of section 1985(2) requires a racial or class-based invidiously discriminatory conspiratorial animus.

THE MEANING OF "ATTENDED"

Because the plaintiffs failed to allege "attended or testified" in their pleading, the district court held that plaintiffs failed to state a cause of action. The panel rejected such a literal approach to construing the plaintiffs' pleading and held that the filing of a federal lawsuit is sufficient participation in the federal judicial system to constitute attendance within the meaning of the words "attended or testified" in clause B of section 1985(2). In affirming the district court, the en banc majority purports to give "attend" its plain dictionary meaning — to be present at. The en banc majority then relies on the existence of violence during the Reconstruction to restrict that presence to physical presence. Although the en banc majority opinion does not expressly limit this physical presence to the trial phase, this meaning of attend can be gleaned from the en banc majority's refusal to include the filing of a federal lawsuit within the meaning of "attend." Such a reading, however, is much too narrow.

The dictionary does not limit the definition of attend to physical presence. Webster's Third New International Dictionary 140 (1976). Inherent in the very concept of legal representation is the notion that a party is present in

federal court through his chosen representative.[13] For example, the legal definition of "appearance" is a coming into court as party to a suit, either in person or by attorney, whether as plaintiff or defendant. Black's Law Dictionary 89 (5th ed. 1979).

It is true that, as the en banc majority opinion notes, [p]assage of the Ku Klux Klan Act was 'motivated by a desire to prevent and punish acts of terror or intimidation that threatened the attempt to create a political environment hospitable to equality.' "[14] However, physical violence was also available against those who simply filed federal civil rights suits during the Reconstruction, whether filed in person or through an attorney. Even if physical presence were the touchstone, does not a party attend a federal court when he or she personally hand delivers the complaint to the court clerk? Not only can one be physically present at the filing of the lawsuit, but also at, say, a pretrial conference, a temporary restraining order hearing, and many other pre-trial activities. And when the Klan Act was enacted, the pro se filing of federal suits was more likely. In any event, letting the scope of the statutory protection turn on whether the suit is filed by the party or his attorney seems quite arbitrary.

A functional approach is preferable here. The congressional objective is evident from the fact of the statute itself. Its manifest purpose is to protect the sanctity and integrity of the federal judicial process and the ability of all to participate freely therein so that justice will not be

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[13] Indeed, in the eyes of the law the agent is considered as standing in place of the principal, and an attorney is an agent or substitute for the client. Black's Law Dictionary 59, 117, 807, 1107 (defining "agent," "attorney," "legal representative," "representation of persons," and "representative").

[14] 648 F.2d at 348, *quoting* Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U.Chi.L.Rev. 402, 405 (1979).

obstructed or miscarried. It makes little sense to limit the protection of the first half of section 1985(2) merely to presence at the trial phase of the litigation. Justice does not start on the day of trial. In fact, the filing of the lawsuit is a necessary antecedent for the parties and witnesses to testify. The en banc majority's conception would preclude federal plaintiffs at the outset from having the opportunity to testify. The statute should protect a person who participates in the federal system of justice either personally or through an attorney — from the filing of a complaint to settlement or execution of judgment. A functional approach should be preferred over a literal, restrictive, narrow approach to the interpretation of the meaning of "attend." The functional approach seems truer to the congressional purpose of the statute and avoids the impracticality of deciding at what point in the litigation the statutory protections attach.

In suppor of narrowly interpreting "attend," the en banc majority relies on *Griffin*. That case, however, did not endorse the imposition of judicial limitations on section 1985 suits. *Griffin* clearly stated that the sweep of section 1985 is as broad as its language. 403 U.S. at 97, 91 S.Ct. at 1795. Furthermore, *Griffin* assured the existence of a section 1985(3) cause of action against private conspiracies. It did not impose a limit on section 1985(3), but merely recognized and gave effect to section 1985(3)'s own self-proclaimed limitations.

Under the functional approach, the only plaintiffs in this case that would come within the protection of clause B of section 1985(2) are those who filed claims in federal court. This includes plaintiff Kimble, but excludes those members of the class who filed claims in state courts or with state and federal workmen's compensation boards. Since blacklisting is just one form of retaliation, and the loss or denial of employment is an injury to property, Kimble and those

like him should possess a cause of action under clause B. Of course, whether they could prove up their claims should have been a matter for the merits on remand.

CONCLUSION

Accordingly, this writer stand by the panel majority's opinion. *Griffin* requires only an injuriously retaliatory animus, not an invidiously discriminatory animus, for the conspiracy in this case. To include filing suit within the meaning of "attend" is both reasonable and practical. And it poses no danger of federalizing state tort law. I therefore dissent.

Opposition

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NO. 81-536

In the Supreme Court of the United States

October Term, 1981

VERSIE KIMBLE,

Petitioner,

VERSUS

D. J. McDUFFY, INC. and
INDUSTRIAL FOUNDATION OF THE SOUTH,

Respondents.

BRIEF BY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. In order to bring suit under Clause B of 42 U.S.C. §1985 (2), complaining of purely private action, must not the petitioner show as a threshold matter that the action complained of (a) resulted from a class-based, invidiously discriminatory animus and (b) was illegal independently of the civil rights statute?

II. Has not the plaintiff failed to establish that the facts of this case present either the requisite class-based animus or the requisite independent illegality?

III. Has not the plaintiff failed to meet the requirements of 42 U.S.C. §1985 (2), Clause B, by alleging only the "filing" of suits in the courts of the United States when the statute provides a cause of action only for injuries resulting from having "attended and testified" in the courts of the United States and by alleging a cause of action based on alleged activities of the respondents with no direct hearing on federal court proceedings?

IV. Are not respondents' challenged activities protected by the First Amendment to the United States Constitution?

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NO. 81-536

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

VERSIE KIMBLE,

Petitioner,

VERSUS

D. J. McDUFFY, INC. AND
INDUSTRIAL FOUNDATION OF
THE SOUTH,

Respondents.

BRIEF BY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

There is no special or important reason why certiorari should be granted herein. This action was filed in 1973, by a white, male oilfield worker, Versie Kimble ("Kimble"), on behalf of himself and others based on an obscure provision of the Ku Klux Klan Act of 1871, which was enacted pursuant to the enforcement provisions of the Fourteenth Amendment to the United

States Constitution. The plaintiff sought to resurrect this rarely used statute, 42 U.S.C. §1985 (2), in order to attack purely private conduct consisting of the dissemination of truthful public record information among employers. Specifically, the suit alleged that Versie Kimble was terminated because of having filed an industrial accident personal injury suit against a previous employer. There is no allegation whatsoever of the presence of state action in this litigation. Therefore, the central issues raised by this case both at the District Court and Court of Appeals levels were whether a plaintiff must show a class-based, invidiously discriminatory animus and independent illegality to state a cause of action pursuant to the first part of 42 U.S.C. §1985 (2) and, if such requirements were applicable to this statute, whether this plaintiff has met those requirements. In addition, the case presented the questions of whether the *filing* of suits in the Courts of the United States is equivalent to "attending and testifying" in federal court within the meaning of §1985 (2) and whether an allegedly retaliatory firing was too far removed from the federal court personal injury lawsuit of the plaintiff to give rise to a claim under §1985 (2).

A careful analysis of the cases decided under 42 U.S.C. §1985 (2) reveals that there is no conflict among the Circuits in interpreting this statute and in applying it to different factual situations. All of the Circuits which have considered §1985 (2) have agreed that the statute should be narrowly construed and carefully applied in cases where there is no state action alleged. As discussed below, the "conflict" among the Circuits which the petitioner alleges to exist involves only superficial distinctions arising from factually distinguishable cases; thus, the conflict-in-the-circuits argument is inapposite.

Given both the narrowness of the factual setting, the obscurity of the statutory provision on which the case is based and the absence of a genuine conflict among the Circuits, as well as the Fifth Circuit's thorough examination and analysis of all the issues raised in the case, it would be appropriate for this Court to deny the Petition for Certiorari and leave the well-considered *en banc* decision of the Fifth Circuit undisturbed. *Kimble v. D. J. McDuffy, Inc.*, 445 F. Supp. 269 (E.D. La. 1978), *aff'd en banc*, 648 F.2d 340 (5th Cir. 1981).

FACTUAL BACKGROUND

The amorphous plaintiff class created by the 1973 filing of this action was composed of all persons working in the oil-drilling industry who allegedly had been denied employment by private employers as a result of a purported conspiracy between such employers and respondent, Industrial Foundation of the South ("IFS"). Established in 1966, IFS is a non-profit corporation which assists member companies in part by collecting from public records and making available objective data derived from industrial accident suits and worker's compensation claims on the ground that such information has a direct bearing on the health, fitness, and physical ability of the prospective employees. Defendant, D. J. McDuffy, Inc. ("McDuffy"), now defunct, was an oil well service company formerly headquartered in Plaquemine, Louisiana, and for whom Kimble formerly worked as a driller on an inland bay barge.[1]

[1] Rule 28.1 of the Rules of this Court is inapplicable to respondents, D. J. McDuffy, Inc. and Industrial Foundation of the South.

In connection with its services to employer subscribers, IFS complies fully with the provisions of the Fair Credit Reporting Act of 1970, 15 U.S.C. §1681, *et seq.* ("FCRA"), insofar as the FCRA governs employment reports. Pre-screening reports made by IFS to subscribers are intended to be and are used by employers as simply an additional factor in the hiring decision-making process. Through IFS, a member company can obtain this necessary information in an expeditious, reliable, and legal manner. The data collection by IFS directly bears on the physical condition and ability of an employee to perform strenuous and dangerous jobs and permits the employer to verify in an efficient and economical manner the representations contained in employment applications concerning past accidents and injuries. It is unfortunately true that such applications frequently omit or misrepresent information concerning past accidents and injuries, as well as the applicant's physical fitness.

For purposes of consideration of the Motion for Summary Judgment which the respondents filed in the District Court, it was necessary for the Court to accept as true the petitioner's factual allegations. However, the truth of a great many of those allegations, including assertions set forth in the Petition for Writ of Certiorari, has been repeatedly denied by respondents and is unsupported by the record in this case. For example, respondents emphatically deny that Kimble's employment was terminated by D. J. McDuffy because of an IFS report of his personal injury suits against prior employers. The record demonstrates that Kimble was hired by McDuffy to replace James Duke ("Duke") as a driller on a bay barge. During the period of Kimble's employment on the McDuffy barge (December, 1972, through April, 1973), Kimble made known to his fellow

employees his intention (which was subsequently carried out) to run for the full-time political office of Supervisor in the Town of McCall Creek, Mississippi.

On March 31, 1973, Duke communicated to McDuffy his desire to return to work as a driller for McDuffy. In light of Kimble's announced decision (which was fulfilled) to run for full-time public office in June, 1973, supervisory employees of McDuffy made the decision to terminate Kimble after the end of his next shift and to hire Duke as Kimble's replacement. Clearly, McDuffy's decision to terminate Kimble was based on his political career plans and not on McDuffy's application for IFS membership which the record reveals was received by IFS on March 27, 1973. Kimble was defeated in his 1973 bid for public office. Under customary procedures, McDuffy requested and received information from IFS on both existing employees and applicants. The information did include a report (obtained from public records) on prior industrial accident claims filed by Kimble; however, the information was not reviewed by McDuffy until the week following March 31, 1973, and was not a consideration in the March 31, 1973 decision to terminate Kimble.

Likewise, the Petition for Certiorari on page 7 alludes to and seeks to rely on the deposition testimony given by Benjamin Tisdale and Howard Hampton. Such testimony, however, must be discounted since both men were at the time of their depositions embroiled in an acrimonious dispute with their former employer, an IFS-subscriber. Their litigation with their former employer gave rise to a bias which severely impairs the reliability of their statements concerning the utilization of information obtained from IFS. Moreover, their actions and the actions of their former employer cannot be imputed to respondents.

Applying firmly established summary judgment procedure under Rule 56 of the Federal Rules of Civil Procedure, the District Court assumed all facts and inferences in favor of the plaintiff and held that there was no genuine issue as to any material fact with respect to the presence *vel non* of jurisdiction. 445 F.Supp. at 271-72. The Fifth Circuit, sitting *en banc*, upheld the lower court stating: "We now hold that Kimble's allegations do not come within the scope of Section 1985 (2), and therefore affirm the district court." 648 F.2d at 342. Similarly, the appellate court stated: "For the purposes of the defendants' Motion for Summary Judgment, we must assume that Kimble's factual allegations are correct." 648 F.2d at 343.

THE OPINIONS BELOW

The District Court, Fifth Circuit Judge Alvin B. Rubin, sitting by designation, granted defendants-respondents' Motion for Summary Judgment under Rule 56, F.R.Civ.P., and wrote a supporting opinion which is published at 445 F.Supp. 269 (E.D. La. 1978). For purposes of discussion, Judge Rubin divided 42 U.S.C. §1985 (2) into four clauses which he designated by the letters A, B, C and D. The opinion then analyzed the specific requirements for a cause of action under the various parts of §1985 (2).

Recognizing that only rarely has 42 U.S.C. §1985 (2) been invoked, Judge Rubin correctly looked to those cases interpreting a related statute, 42 U.S.C. §1985 (3), for guidance in interpreting §1985 (2). 445 F.Supp. at 273. Judge Rubin found that the requirement of a class-based, invidiously discriminatory animus on the part of the defendant was an element of a cause of action under Clauses C and D of 42 U.S.C. §1985 (2). 445 F.Supp. at 274. The District Court further held that the facts

alleged by the plaintiff could only arguably state a claim under Clause B of §1985 (2). However, Judge Rubin concluded that the allegation in the Complaint that members of the plaintiff class had *filed* claims in federal court did not meet the common definition or the intended meaning of the phrase "attended and testified" used in Clause B of the statute.

On appeal, a Fifth Circuit panel, composed of Judges Ainsworth, Tuttle and Sam D. Johnson, in a two-to-one decision, reversed in part and affirmed in part the summary judgment issued in favor of defendants-respondents by Judge Rubin. *Kimble v. D. J. McDuffy, Inc.*, 623 F.2d 1060 (5th Cir. 1980) (now set aside). Thereafter, defendants-respondents filed a Petition for Rehearing En Banc urging the Court to reconsider and reverse the panel majority's decision. This Petition for Rehearing En Banc was granted with the effect of vacating the Fifth Circuit panel's decision. On June 18, 1981, the *en banc* opinion was issued reversing the three-judge panel and affirming Judge Rubin's grant of summary judgment. The majority opinion, authored by Judge Ainsworth, was joined in by eleven judges and held that the class-based animus requirement applied to *all* clauses of §1985 (2), including Clause B, as dictated by a careful analysis of the statute's original enactment, the Ku Klux Klan Act of 1871, 17 Stat. 13, and its purposes and the cases construing 42 U.S.C. §§1985 (2) and (3). The majority went on to hold that the District Court was correct in its conclusion that an allegation of "filing" claims in federal court does not satisfy the statutory requirement of "attending or testifying." 648 F.2d at 347-48.

Four judges in two concurring opinions agreed with the majority's finding of no cause of action for these

plaintiffs under §1985 (2). The concurring opinions would have found that Clause B of §1985 (2) did not contain a class-based, invidiously discriminatory animus requirement. No judge has suggested in either a majority or a dissenting opinion that if Clause B of §1985 (2) included a class-based animus requirement, these plaintiffs could satisfy that requirement. On September 16, 1981, a Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was docketed in this Court by plaintiff-petitioner Versie Kimble.

REASONS FOR DENIAL OF THE PETITION FOR WRIT OF CERTIORARI

I. THE CLASS-BASED, INVIDIOUSLY DISCRIMINATORY ANIMUS AND INDEPENDENT ILLEGALITY REQUIREMENTS OF 42 U.S.C. §1985 (2).

As previously noted, the portion of the Ku Klux Klan Act of 1871 at issue in this case, 42 U.S.C. §1985 (2), has been considered by relatively few courts. However, the petitioner has argued that the absence of the specific terms "equal protection" or "equal privileges and immunities" before the semi-colon in §1985 (2) means that a plaintiff need not show that the alleged deprivation of his rights was the result of such animus. This is a self-serving and unsupportable argument which has now been rejected by the Fifth Circuit in this case and by the Eighth Circuit in *Jones v. United States*, 401 F.Supp. 168 (E.D. Ark. 1975), *aff'd*, 536 F.2d 269 (8th Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

The other Circuit and District Courts which have considered cases brought under both 42 U.S.C. §1985 (2)

and §1985 (3) have recognized the essential requirement of adhering to an all-important guidepost in interpreting Reconstruction Era civil rights legislation: Purely private conduct should be found to violate these statutes in only the most extreme of circumstances and in a manner that will not give rise to a general federal tort law.[3]

This Court's landmark of *Griffin v. Breckenridge*, 403 U.S. 88 (1971), held that although causes of action could exist for purely private violations of the related 42 U.S.C. §1985 (3), courts should examine carefully the assertion of any such claim. The well known caveat of *Griffin* instructs as follows, 403 U.S. at 101-02:

> That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others . . . . The constitutional shoals that would lie in the path of interpreting §1985 (3) as a general federal tort law can be avoided by giving full effect to the congressional purposes — by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment . . . . The language requiring intent to

[3] Petitioner's argument that the class-based invidiously discriminatory animus required is not applicable to 42 U.S.C. §1985(2) in its entirety has been rejected by numerous federal courts on various occasions. *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975); *Hahn v. Sargent*, 388 F.Supp. 445 (D. Mass. 1975), *aff'd*, 523 F.2d 461 (1st Cir.), *cert. denied*, 425 U.S. 904 (1975); *Kerckhoff v. Kerckhoff*, 369 F.Supp. 1165 (E.D. Mo. 1975); *Johnston v. National Broadcasting Co. Inc.*, 356 F.Supp. 904 (E.D.N.Y. 1973); *McIntosh v. Garofalo*, 367 F.Supp. 501 (W.D. Pa. 1973); *Phillips v. Singletary*, 350 F.Supp. 297 (D.S.C. 1971); *Kitchen v. Crawford*, 326 F.Supp. 1255 (N.D. Ga. 1970), *aff'd*, 442 F.2d 1345 (5th Cir.), *cert. denied*, 404 U.S. 956 (1971).

> deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.

Thus was enunciated the "class-based, invidiously discriminatory animus" requirement for claims under §1985 (3) predicated on purely private conduct. This essential requirement stems from an appropriately narrow interpretation of the equal protection guarantee. Since similar language appears in §1985 (2), the courts in the wake of *Griffin* have applied the class-based animus requirement to §1985 (2) as well. The Fifth Circuit *en banc* majority in *Kimble* stated unequivocally that the common statutory origins of §§1985 (2) and (3) compel the finding of a class-based animus requirement for all parts of §1985. "The *Griffin* analysis is not applicable to only a small part of Section 2 of the Ku Klux Klan Act, but to the act in its entirety. If racial or class-based animus is required by Section 1985 (3), it is required by Section 1985 (2) as well." *Kimble, supra*, 648 F.2d at 347 (footnotes omitted).

The Fifth Circuit held *en banc* in *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977), that still another requirement for stating a cause of action under §1985 (3) (and by analogy under §1985 (2)) was implicit in *Griffin*, *i.e.*, that the act complained of must be *illegal* independently of the civil rights statute itself. This requirement, which will be more fully discussed below, is also necessary to avoid creation of a general federal tort law.

Jones v. United States, supra, involved only what we here refer to as Clauses A and B of §1985 (2), and focused on an alleged injury resulting from jury tampering. The Eastern District of Arkansas noted that the plaintiff had cited *Kelly v. Foreman,* 384 F.Supp. 1352 (S.D. Tex. 1974), for the proposition that no invidious discrimination need be shown for a claim under that portion of §1985 (2) before the semi-colon. *Kelly* is also relied on by petitioner. The defendants in *Jones* argued that *Griffin* required a showing of racial or class-based discrimination regardless of the clause of §1985 (2) on which the plaintiff relied. The U.S. District Court in Arkansas agreed with the defendants and, after evaluating the legislative history and the *Griffin* line of cases, stated as follows, 401 F.Supp. at 174:

> The obligation of this Court is to follow the dictates of the United States Supreme Court, and its reasoning relies on congressional language referring to the entirety of 42 U.S.C. §1985.
>
> Futhermore, in *Means v. Wilson,* 522 F.2d 833 (C.A. 8th Cir. 1975), in an opinion dealing with voting rights under §1985 (3), the Court held that "a complaint under 42 U.S.C. §1985 (3) must allege facts to show that intentional or invidious discrimination was the object of the conspiracy." As the voting rights clause under §1985 (3) does not contain any equal protection language, the obvious implication arises that racial or class-based discrimination is necessary under all of §1985 (3).
>
> Since the language and style of §1985 (3) is similar to §1985 (2), it is not a great step to con-

> clude that if racial or class-based animus is necessary under all of §1985 (3) it must be necessary under all of §1985 (2).

On appeal, the Eighth Circuit affirmed the District Court's ruling in *Jones* and this Court denied certiorari. The Court of Appeals held as follows, 536 F.2d at 271:

> The District Court in its opinion carefully analyzed the legislative history of Section 1985 and the Civil Rights Acts in general and concluded that the racial or class-based discrimination rationale expressed by the Supreme Court in *Griffin v. Breckenridge [supra]*, applies equally to all clauses of that statute. 401 F.Supp. at 174. We affirm that holding. [Citations omitted.]

Interestingly, Kimble relies on *Britt v. Suckel*, 453 F.Supp. 987 (E.D. Tex. 1978), wherein an attempt was made to distinguish *Griffin's* establishment of a strict class-based animus requirement. (Petition for Certiorari at 10.) *Britt* can be quickly disposed of in that, as a District Court decision from which no appeal was taken, it can be safely stated that, based on *Kimble*, the Fifth Circuit would have resoundingly reversed the holding under §1985 (2). *Britt* makes the bootstrap argument that since the defendant's actions were allegedly illegal independently of §1985 (2), the requirement of a class-based animus is satisfied by the existence of a *group of victims* of that purported illegality. This circular reasoning ignores *Griffin's* dictate that not "all tortious, conspiratorial interferences with the rights of others" suffice to invoke the protections of 42 U.S.C. §1985. As *McLellan* makes clear, there must be an *independent*, in-

vidiously discriminatory purpose aimed at an identifiable class behind the defendant's actions. While the presence of a class-based animus is necessary, standing alone it is insufficient to make out a §1985 (2) cause of action; likewise, the presence of independent illegality is an absolutely necessary component, but without more there can be no valid §1985 (2) claim. *Both* requirements must be separately satisfied.

It should be remembered that *Griffin v. Breckenridge, supra*, and, of necessity, the progeny of *Griffin*, broke only limited new ground in permitting a remedy in the absence of state action. Petitioner seems to assume, however, that *Griffin* stands for the proposition that there is no longer a state action requirement attached to §1985 under any circumstances and that *Griffin* overruled the Supreme Court's 1951 decision in *Collins v. Hardyman*, 341 U.S. 651 (1951). Actually, the Supreme Court distinguished *Griffin* from *Collins* on its facts. The constitutional undergirding which supported jurisdiction in *Griffin* was the presence of a Thirteenth Amendment violation due to racial discrimination and infringement of the fundamental right to travel. Neither factor is present and neither has ever been alleged by Kimble in the petition *sub judice*.

Judge Ainsworth for the Fifth Circuit *en banc* carefully analyzed the legislative history of 42 U.S.C. §§1985 (2) and (3) and determined that their common statutory origin dictated the application of a class-based animus requirement to all portions of both statutes. The Court went on to state the following, 648 F.2d at 346-47:

> *Griffin* evidenced a general concern that actions brought under Section 1985 must be carefully delineated in accordance with the

> statutory purposes of the Act in order to avoid the unintended creation of a general federal tort law. Section 1985 (2) and Section 1985 (3) are both derived from Section 2 of the Ku Klux Klan Act. Both modern sections are liberally laced with references to "the equal protection of the law," but neither includes a reference to equal protection in each and every clause of the section. The Supreme Court did not arrive at its conclusion that Section 1985 (3) required racial or class-based animus through a hypertechnical analysis of the structure and grammar of the section. Instead, the Court examined the overall purpose of Congress in passing the Ku Klux Klan Act, reached the obvious conclusion that Congress did not intend to create a general federal tort law, and held that Congress intended the Act to apply only in cases where there was racial or class-based animus. The *Griffin* analysis is not applicable to only a small part of Section 2 of the Ku Klux Klan Act, but the Act in its entirety. If racial or class-based animus is required by Section 1985 (3), it is required by Section 1985 (2) as well. [Footnotes omitted].

Although it was not necessary for the Fifth Circuit *en banc* to reach the issue, it is implicit in the above-quoted language that if the *Griffin* class-based animus requirement is embodied in §1985 (2), then the *McLellan* independent illegality requirement is also embodied in §1985 (2). It is this restrictive analysis which prevents the petitioner from transforming these Reconstruction Era statutes into a general federal tort law. As the Fifth Circuit stated in *McLellan*, 545 F.2d at 927:

> It is true that courts often, and quite understandably, speak in terms of the plaintiff's legal rights being abused. This does indeed occur in every successful 1985 (3) action. But the legal right referred to in those instances is the right of every person not to be victimized by another's illegal behavior. Section 1985 (3) redresses deprivations of the protection of the laws, and one is only deprived of the protection of the laws when the laws themselves have been violated.
>
> No one has an absolute right to complain of every instance in which the action of others infringes upon his own behavior. It is only when that action is unlawful that an individual has legal cause to complain of his injury.

The petitioner has failed to allege facts which could supply the indispensable requirements of invidiously discriminatory, racial or otherwise, class-based animus and independent illegality for a cause of action cognizable under 42 U.S.C. §1985 (2).

II. THE ABSENCE IN THIS CASE OF CLASS-BASED ANIMUS AND INDEPENDENT ILLEGALITY.

Once the class-based invidiously discriminatory animus and independent illegality requirements are found applicable to all four clauses of §1985 (2), then an analysis of the facts of this case must be made to determine whether the petitioner has fulfilled those criteria. Clearly, the petitioner here has not and cannot make the necessary showing as to either requirement. Kimble has

acknowledged at every turn that race, sex and national origin play no part in his alleged deprivation. Instead, the plaintiff urges this Court to recognize "500,000 working men and women" as a class of the sort contemplated by the statute's protection.

The petitioner simply argues that the existence of the Jones Act, the Longshoremen's and Harbor Workers' Compensation Act and "other offshore regulations," which regulate in various ways the working conditions of "seaman, offshore workers, workers on the high seas, [and] workers in the oil drilling industry," should somehow raise these workers to a position of special protection under the Ku Klux Klan Act. (Petition for Certiorari at 18.) The argument is meritless and ignores this Court's *Griffin* instruction against extending far-reaching statutory protections to groups who lack a common trait other than the injury they allegedly suffered.

The concern of federal courts for maintaining limits on factual settings in which a class-based animus will be found was illustrated in *Lopez v. Arrowhead Ranches*, 523 F.2d 924 (9th Cir. 1975), a precedent curiously not mentioned by petitioner. In *Lopez*, a Court of Appeals found that the requisite class-based, invidious discrimination was lacking in a §1985 (3) action brought by both citizen and legal alien farm workers asserting that employers hired illegal aliens in an attempt to circumvent the workers' statutory protections. As the Ninth Circuit stated, 523 F.2d at 928:

> [It] seems to us a necessary corollary that the class animus alleged be consistent with the deprivation of rights alleged . . . . Of itself, the

> creation of a class of victims by tortious conduct does not bring a claim within §1985 (3); such a class is created by every tort. Plaintiffs have not and cannot allege, as they must if they would succeed, anything to distinguish them as intended victims other than that they *belong to the class possessing the rights deprived* — a circumstance true of all potential *employees* involved. Under *Griffin* we think the *class status* providing the motivating animus *must be created by a fact other than possession of the right deprived* — otherwise virtually every conspiratorial deprivation of a primary right would be actionable under §1985 (3) regardless of the pertinent statutory enforcement provisions. [Emphasis added, footnotes omitted].

See also Kimble v. D. J. McDuffy, Inc., supra, 445 F.Supp. at 274.

In discussing the absence of a class-based animus, the *en banc* Fifth Circuit *Kimble* majority opinion correctly stated, 648 F.2d at 347:

> . . .[N]o showing of racial or class-based animus can be made in this case. Clearly, race is not involved. Moreover, the "class" of persons who have filed personal injury lawsuits or workmen's compensation claims is neither a class based on political beliefs or associations (the kind of class envisioned by the framers of the Ku Klux Klan Act) nor a class "having common characteristics of an inherent nature," 445 F.Supp. at 273 (the kind of class afforded

> special protection under the equal protection clause). The district court and the panel majority acknowledged that the logic of *Griffin* would be lost if the "class" of people allegedly victimized by the defendants' allegedly tortious conduct was considered to be a sufficient class under Section 1985 merely by virtue of their common complaint. [Citations omitted.]

To the extent that workers have been recognized historically as disadvantaged in the United States, federal laws have encouraged the organization of labor unions to represent workers and equalize power in the bargaining process with management. The judicial system has traditionally *abstained* from becoming involved in any dispute which is essentially a battle between labor and management. This doctrine directly contradicts the suggestion of the petitioner and the District Court opinion in *Britt v. Suckle, supra*, on which Kimble repeatedly relies, that courts have viewed workers as needing their special protection. Numerous federal courts considering §1985 (3) claims have agreed that the class which Kimble seeks to represent is not deserving of recognition as a disadvantaged class within the meaning of the *Griffin* guidelines. See *Silkwood v. Keer-McGee Corp.*, 637 F.2d 743 (1980), *cert. denied*, 50 U.S.L.W. 3221 (Oct. 6, 1981); *Taylor v. Brighton Corp.*, 616 F.2d 256 (6th Cir. 1980); *Iowa Beef Processors, Inc. v. Gorman*, 476 F.Supp. 1382 (N.D. Iowa 1979); *Amalgamated Clothing & Textile Workers Union v. J. P. Stevens & Co.*, 475 F.Supp. 482 (S.D.N.Y. 1979).

Petitioner's allegations of a basis in this case for independent illegality as raised in his several briefs on appeal have been notably lacking in authority. The

arguments employed by Kimble for the proposition that it is unlawful to utilize a central clearing house, such as IFS, to obtain objective and highly pertinent employment data are either inapplicable to Kimble or simply do not make a retaliatory termination illegal.

As discussed above, IFS exists as a means by which subscribing employers may expeditiously and economically verify that employment applications contain accurate information, specifically information concerning prior industrial accidents and the physical condition and health of the applicant for rigorous and often dangerous work. Frequently, job applicants purposely omit information about previous industrial accidents and physical injuries resulting therefrom. Clearly, neither termination nor refusal of employment because of falsification of information contained in an employment application is illegal under any state or federal law. *See, e.g., NLRB v. Florida Steel Corp.*, 586 F.2d 436, 444 (5th Cir. 1978); *Firestone Tire & Rubber Co. v. NLRB*, 539 F.2d 1335, 1336 (5th Cir. 1976). Moreover, there is no legal right to be hired by a private employer. *Cf. Lopez v. Arrowhead Ranches, supra*, 523 F.2d at 927.

Were Kimble a worker covered by either the Outer Continental Shelf Lands Act, 43 U.S.C. §1331, *et seq.*, or the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.*, both of which statutes are cited by petitioner, he would necessarily depend on 33 U.S.C. §948 (a) as his basis for independent illegality. However, this provision, quoted by petitioner at Pages Twenty and Twenty-One of his Petition, is part of an administrative scheme established by the Longshoremen's and Harbor Workers' Compensation Act under the direction of the United States Department of Labor. Peti-

tioner fails to reckon with the fact that the provisions of §948 (a) set forth a clearly limited administrative remedy meted out by the Department of Labor. Only the Department itself has recourse to the Federal Courts and then only if the employer fails to pay the $100.00 to $1,000.00 fine levied by the Department of Labor for such activity. Clearly, Congress did not intend this statute to be transformed into the basis for a class action under 42 U.S.C. §1985 (2).

Were Kimble a Jones Act seaman, he would be required to look to cases decided under the Jones Act's general tort remedy to find that the discrimination he alleges is somehow independently illegal. However, the Jones Act does not make retaliatory firing of a personal injury plaintiff illegal. Petitioner also cites the recent (August 21, 1981) Fifth Circuit decision of *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981), as a basis for asserting that respondents' actions might be illegal independently of §1985 (2). *Smith* found that an intentional retaliatory firing was tortious under the general maritime law under certain conditions. However, the existence of a possible civil remedy for compensatory damages for the conduct complained of does not make that conduct in and of itself illegal under *McLellan* and it certainly does not assist petitioner in establishing a class-based animus. Moveover, it is not even known if Kimble is entitled to invoke the general maritime law.

McLellan, supra, further provides a useful comparative analysis with respect to the class animus and independent illegality arguments made by the petitioner. If the Federal Courts did not see fit to extend protection from job discrimination to those who have

proven they are incapable of handling their own financial affairs — individuals who have voluntarily filed for personal bankruptcy (as had the plaintiff in *McLellan),* it is illogical to extend such protection to those who are thought to be merely *at risk* of being unable to handle their affairs — Jones Act seamen or workers in the oil drilling industry. Accordingly, even if the petitioner could somehow prove conspiratorial retaliation in the job market, Kimble's claims could not stand since respondents have engaged in no independently illegal activity under any of the statutes or cases cited by petitioner.

In the Petition for Writ of Certiorari, no new theory was added under which the alleged actions of respondents might be found to be illegal independently of §1985 (2) itself. In fact, there is no basis whatsoever for a finding of independent illegality in this case and, therefore, summary judgment was entirely appropriate.

III. FILING IS NOT "ATTENDING" OR "TESTIFYING" AND THE CONDUCT COMPLAINED OF IS TOO REMOTE FROM THE FEDERAL COURT PROCEEDINGS TO STATE A CLAIM UNDER 42 U.S.C. §1985 (2).

Even if this Court should disagree with the *en banc* Fifth Circuit that the class-based animus and independent illegality requirements are applicable to all parts of 42 U.S.C. §1985 (2), certiorari would, nevertheless, be inappropriate in that Kimble's Complaint still fails to state a claim under Clause B of 42 U.S.C. §1985 (2). Clause B [which is the only portion of §1985 (2) under which Kimble's allegations could even arguably state a claim] reads in pertinent part as follows:

> If two or more persons . . . conspire to deter, by force, intimidation, or threat . . . or to injure such party or witness in his person or property on account of his having so attended or testified [in any Court of the United States]. . . .

As the District Court and the Fifth Circuit noted, the plaintiff did not allege injury as a result of having "attended or testified" in Federal Court; rather, he has alleged injury because he "filed" personal injury suits in Federal Court. The *en banc* majority quoted with approval, 648 F.2d at 347-48, the following language from the District Court opinion, 445 F.Supp. at 276:

> [Section 1985 (2)] does not create a claim for every conspiracy entered into with intent to deny a citizen access to a court, or to retaliate against a citizen for his utilization of the federal court system. If they are to come within the plain language of the statute, the plaintiffs must allege that they were injured on account of having *attended* or *testified in* federal court. This they have not done . . . . At most, the conspiracy charged was aimed at injuring the plaintiffs on account of their having asserted a claim or filed a lawsuit. Congress did not undertake to make that behavior actionable. [Emphasis in original, footnotes omitted.]

The Fifth Circuit recognized the elementary rule that statutory construction and interpretation begin with the precise language of the statute and concluded that the plain meaning of the word "attend" does not include the act of "filing" a lawsuit. Petitioner Kimble obviously is asking this Court to bypass the rigors of accepted statutory interpretation in favor of a broad-brush

approach to the readily definable terms of filing, attending, and testifying. Whether Congress in 1871 might have extended the scope of §1985 (2) to encompass the mere act of filing is an academic question on which an advisory opinion need not be issued. Of importance is the conclusion that, regardless of whether such power was possessed, the enacting legislature did not choose to attempt to exercise it. As this Court concisely stated in *Maine v. Thiboutot*, 448 U. S. 1, 8 (1980), involving the companion statute of 42 U.S.C. §1983: "Congress was aware of what it was doing, and the legislative history does not demonstrate that the plain language was not intended."

The petitioner cites *C-Line, Inc. v. United States*, 376 F.Supp. 1043 (D.R.I. 1974), and *United States v. Bradford*, 493 F.2d 1282 (7th Cir. 1974), for his argument that the *en banc* majority and the District Court were excessively restrictive in their definition of the words "attended and testified." However, neither of those cases interprets a Ku Klux Klan Act statute and *Griffin v. Breckenridge, supra*, and its progeny have dictated that the mandate of the federal courts in interpreting Reconstruction Era legislation in the context of purely private conduct is to take extreme care in finding that a cause of action has been stated. A number of cases under 42 U.S.C. §1985 (2) have been dismissed by federal courts because the actions which formed the basis of the suit were simply too far removed from the federal litigation. *Brawer v. Horowitz*, 535 F.2d 830 (3d Cir. 1976); *Williams v. St. Joseph Hospital*, 629 F.2d 448 (7th Cir. 1980); *Brown v. Chaffee*, 612 F.2d 497 (10th Cir. 1979).

Brawer v. Horowitz, supra, is the first of the cases cited by petitioner as being in conflict with the Fifth Circuit's *en banc* decision in *Kimble*. However, *Brawer*

reaches the same result as *Kimble* in finding no cause of action under §1985 (2) and in construing the statute to provide no remedy for actions only remotely related to a federal court proceeding. The plaintiff in *Brawer* alleged that the defendant conspired to use perjured testimony and to withhold exculpatory evidence concerning the plaintiff in order to influence an adverse jury verdict. The actions complained of in *Brawer,* which obviously were much more closely related to the actual federal judicial processes than those alleged in this case, were still found to be insufficiently close to the statutory purpose of §1985 (2) to sustain a cause of action. As the Third Circuit stated regarding Clauses A and B of §1985 (2), 535 F.2d at 840:

> We understand the first part of §1985 (2) to concern itself with conspiratorial conduct that *directly* affects or seeks to affect parties, witnesses or grand or petit jurors. The allegations of this complaint are different in kind. . . . We deem this "influence" to be too remote to fit within the intended ambit of §1985 (2).

In a recent ruling that is highly instructive and factually analogous, the Seventh Circuit in *Williams v. St. Joseph Hospital,* 629 F.2d 448 (7th Cir. 1980), concluded that the plaintiffs' claim was too indirect and remote to be actionable under the Ku Klux Klan Act. In *Williams* the plaintiff class was composed of persons who had filed medical malpractice suits in Joliet, Illinois, and had thereafter allegedly been refused treatment by all doctors in Joliet. The complaint asserted the existence of an unlawful conspiracy among physicians violative of 42 U.S.C. §1985 (2) (and various state and federal antitrust

statutes) because of their refusal to treat anyone who had filed a medical malpractice suit against any doctor in the community. With reference to the allegations under §1985, the Seventh Circuit stated as follows, 629 F.2d at 451:

> The first subsection of §1985 expressly requires "force, intimidation, or threat" and is directed against preventing officials from doing their duty. This provision is obviously inapplicable to the case at bar.
>
> The same is true of the first part of subsection (2) of §1985, which relates to deterring a witness or party from attending Court, or testifying truthfully, or influencing a juror, in any United States Court. Here, too, "force, intimidation or threat" is requisite, and the provision is obviously inapplicable to the case at bar.

Whether the perceived retaliation is the refusal of medical treatment as in *Williams* or is employment related as Kimble alleges, neither of these alleged injuries constitutes the type of "force, intimidation or threat" required under the statute. In short, the statute envisions injurious actions directly related to an actual federal court proceeding and not the kinds of remote actions complained of by petitioner in the case *sub judice.*

The second case heavily relied upon by petitioner in arguing that the Circuits are in conflict in interpreting §1985 (2) is *McCord v. Bailey,* 636 F.2d 606 (D.C. Cir. 1980), *cert. denied,* 101 S.Ct. 2314, 68 L.Ed.2d 839 (1981). *McCord* is not at odds with the Fifth Circuit's *en*

banc decision in *Kimble* because the conduct complained of in *McCord* was closely and directly connected with actual federal court proceedings as §1985 (2) requires. The plaintiff, McCord, alleged that his criminal defense counsel conspired with others to dissuade him from *testifying in his own behalf* before the grand jury which indicted him and at his trial. This alleged conspiracy and the plaintiff's alleged injury were intimately and inextricably intertwined with Mr. McCord's federal criminal trial; the remote, after-the-fact Kimble allegations do not even vaguely resemble the assertions made by McCord.

None of the facts alleged by Kimble indicate that respondents interfered in any fashion with petitioner's federal court proceedings. Even if there were a factual basis for the conduct of which petitioner complains, such conduct was alleged to have taken place *after* the litigation and, therefore, could not have deterred any party or witness from participating in a trial. This conduct is not sufficient to state a cause of action under §1985 (2) as the statute's plain language and the interpretative decisions of *Brawer, Williams,* and *McCord* indicate.[3]

IV. THE FIRST AMENDMENT PROTECTION FOR THE CHALLENGED ACTIVITIES OF RESPONDENTS.

The potential impact of judicial sanctioning of the

[3] The third case claimed by petitioner to be a conflict in the Circuits is *Stern v. U.S. Gypsum, Inc.*, 547 F.2d 1329 (7th Cir. 1977). However, as petitioner himself admits, the language quoted is only dictum found in a footnote of the opinion. The statement quoted actually leaves open the question of a class-based animus requirement for a case of action based on the first two clauses of 42 U. S. C. §1985(2).

cause of action asserted by the petitioner cannot be fully appreciated without considering the unconstitutional infringement of First Amendment rights which would inevitably occur. What has been alleged without factual basis is an economic conspiracy between an organization which gathers information from public records concerning industrial accident suits and makes such data available to its subscribers, who in turn use the information as a factor concerning the health, fitness, and ability of prospective employees in their decision-making process. Such activities and communications are unquestionably protected by the First Amendment to the United States Constitution, as well as by the Fair Credit Reporting Act of 1970, 15 U.S.C. §1681, *et seg.* The law has long recognized a qualified privilege for communications among persons concerning an applicant's legitimate qualifications for employment, *e.g.*, physical fitness. See *Makofsky v. Cunningham*, 576 F.2d 1223, 1236 (5th Cir. 1978); *Greenya v. George Washington University*, 512 F.2d 556, 563 (D.C. Cir.), *cert. denied*, 423 U.S. 995 (1975); *West v. Garrett*, 392 F.2d 543, 544 (5th Cir.1968); see also *Barr v. Matteo*, 360 U.S. 564 (1959). It would be in direct contravention of this longstanding protection of crucial business communications to hold (as the petitioner in effect argues) that such communications cannot include information concerning a job applicant's previous federal court industrial accidents.

Regardless of whether the communication in this case is characterized as commercial or noncommercial speech, the services provided by IFS, as regulated under the Fair Credit Reporting Act, are protected. Commercial speech has received extensive protection from the judiciary under the umbrella of the First Amendment. In fact, this Court has specifically recognized the need to

safeguard the free flow of commercial information. See *Metromedia, Inc. v. San Diego,* 69 L.Ed. 2d 800, 814-15 (1981); *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 776 (1978); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Lagelow v. Virginia,* 421 U.S. 809, 820-21 (1975); *Thornhill v. Alabama,* 310 U.S. 88, 101-02 (1940). Certainly, employers are constitutionally entitled to the same unfettered exchange of commercial information derived from public records that extends to other consumers.

Even when the petitioner's version of the facts is accepted, the scenario alleged in Kimble's complaint by no means rises to the level of a threat to personal rights from private sources which brought about the passage of §1985(2). The crucial requirements of class-based animus and independent illegality have been abandoned for a novel approach designed to assist the federal court plaintiff in bringing an additional civil rights action. This new policy creates an anomaly by distinguishing between suits filed in federal and state courts without requiring that plaintiffs meet the statutory standard of demonstrating a direct interference by the defendants through "force, intimidation or threat" with the actual federal judicial process. The petitioner's arguments leap beyond the reasoned limitations of *Griffin* and its progeny in an attempt to create a totally new cause of action far removed from the path laid out by the enacting Congress and this Court. At no point does the Petition claim that this Court should restrict or forbid employers from communicating with each other in order to verify job references and prior employment histories including the applicant's physical fitness as indicated by industrial accident lawsuits. Yet, on the other hand, the complaint seeks to enjoin that very same activity when conducted

through a company, such as IFS, which expeditiously and economically accomplishes that same task while vastly reducing the time, expense, and margin for error.

CONCLUSION

The decisions of the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit, *en banc*, are in complete accord with the applicable decisions of this Court regarding the appropriate interpretation of the requirements for a cause of action involving purely private conduct when brought pursuant to 42 U.S.C. §1985 (2). The Petition for Certiorari offers no special or important reasons why this Court should review a clearly correct decision of the Court of Appeals. Therefore, certiorari should be denied.

Respectfully submitted,
PHELPS, DUNBAR, MARKS,
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CERTIFICATE OF SERVICE

I, Rutledge C. Clement, Jr., hereby certify that on this 31st day of October, 1981, three copies of the foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, were served upon Lawrence D. Wiedemann, Esquire, of Wiedemann & Fransen, 841 Carondelet Street, P.O. Box 30648, New Orleans, Louisiana 70190, counsel for petitioner, Versie Kimble, by depositing same in the United States mail in a properly addressed envelope with first-class postage prepaid.

It is further certified that all parties required to be served have been served.

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